PROTECTION
against
UNJUSTIFIED DISMISSAL

Protection against unjustified dismissal

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of Conventions and Recommendations

General Survey
on the Termination of Employment Convention (No. 158) and Recommendation (No. 166), 1982

Report of the Committee of Experts
on the Application of Conventions and Recommendations
(articles 19, 22 and 35 of the Constitution)

PROTECTION against UNJUSTIFIED DISMISSAL

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INTRODUCTION

1. In accordance with article 19 of the Constitution of the International Labour Organization, the Governing Body of the International Labour Office decided at its 251st Session (November 1991) to invite the governments of those member States which have not yet ratified the Termination of Employment Convention, 1982 (No. 158), to submit a report on this instrument, and to invite the governments of all member States to provide reports on the Termination of Employment Recommendation, 1982 (No. 166).[1] The reports supplied in pursuance of that decision, together with those submitted in accordance with articles 22 and 35 of the ILO Constitution by the 24 States which have ratified Convention No. 158 (which entered into force on 24 November 1985), have enabled the Committee of Experts on the Application of Conventions and Recommendations, in accordance with its usual practice, to carry out a general survey on the effect given to the instruments under consideration, the first of its kind on these instruments.

Review of standards in the field of termination of employment

2. The traditional rules governing the contract of employment which developed in various countries during the nineteenth century were characterized by a formal symmetry of the rights of either party to terminate the contract of employment, by giving notice, without either party having to justify its decision. However, the consequences of this equivalence of rights differed widely for the parties: termination of the contract by the worker — exercising his fundamental right to protect his freedom of work — is in most cases merely an inconvenience for the employer, whilst the termination of the contract of employment by the employer could result in insecurity and poverty for the worker and his family, particularly during periods of massive unemployment. The disparity of the consequences of each party exercising its discretionary power to terminate the employment relationship led in many countries to a movement towards workers' protection. This development resulted in an extension of the period of notice; the payment of a severance allowance; efforts to restrict the employer's discretionary power to terminate the employment relationship for any reason or without reason

[1] It should be recalled that States which have ratified the Convention are not legally required to apply the Recommendation.

by applying the concepts of the abusive exercise of a right and abusive termination of the employment relationship; and, more recently, the adoption of provisions requiring justification for the termination of the contract of employment by the employer as the employment situation became more difficult.[2] These provisions were supplemented by measures to be applied in the event of workforce reductions for economic, technological, structural or similar reasons.

3. In a resolution adopted in 1950, the International Labour Conference noted the absence of international standards on the termination of contracts of employment and requested a report on national law and practice on the matter for consideration by the Conference. Following a number of studies carried out on the subject, in 1963 the Conference adopted the Termination of Employment Recommendation (No. 119), the first international labour instrument dealing specifically with this issue. This instrument recommended certain fundamental standards with regard to justification for termination, notice, the right to appeal, compensation and income protection, and included provisions concerning reduction of the workforce. It marked the recognition at the international level of the idea that workers should be protected against the arbitrary and unjustified termination of their employment relationship and against the economic and social hardship inherent in their loss of employment.

4. In 1974, the Committee on the Application of Conventions and Recommendations of the International Labour Conference, when considering the General Survey by the Committee of Experts on the Application of Conventions and Recommendations of reports on the application of Recommendation No. 119,[3] acknowledged that this Recommendation had played an important role since its adoption in 1963 in encouraging protection against unjustified termination of employment, and thereby favouring the promotion of employment security which is an essential aspect of the right to work.[4] The Committee concluded that the issue should be put before the Conference in order to draw up another suitable instrument taking into consideration new developments since the adoption of the Recommendation No. 119. At its 211th Session (November 1979), the Governing Body of the ILO decided to place on the agenda of the 67th Session, 1981, of the International Labour Conference an item on termination of employment at the initiative of the employer. Discussions at the Conference led to the adoption in 1982 of the Termination of Employment Convention (No. 158) and Recommendation (No. 166), which replaced the Termination of Employment Recommendation, 1963 (No. 119).

[2] "Thus, today the justification principle has become the centrepiece of the law governing termination of employment by the employer ...", ILC, 67th Session, 1981, Report VIII(1), p. 7.

[3] "Termination of employment", *General Survey of the reports relating to the Termination of Employment Recommendation, 1963 (No. 119)*. ILC, 59th Session, 1974, Report III (Part 4B).

[4] ILC, 59th Session, 1974, *Record of Proceedings*, p. 527.

Content of the Convention and Recommendation

5. The substantive provisions of the Convention contain standards of general application and supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons which are also mandatory. The standards of general application consist of provisions on the justification for termination, procedures prior to or at the time of termination, the procedure of appeal against termination, the period of notice, and income protection in the event of termination of employment. As a basic principle, the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking. Several reasons are listed as grounds that shall not constitute valid reasons for termination, including union membership or participation in union activities outside working hours (or within working hours, with the consent of the employer); seeking office as, or acting or having acted in the capacity of, a workers' representative; the filing of a complaint or the participation in proceedings against an employer; race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; absence from work during maternity leave; and temporary absence from work because of illness or injury.

6. The Convention also provides for the right of a worker who considers his employment to have been unjustifiably terminated to appeal against that termination to an impartial body empowered to decide whether the termination was justified. In contrast with Recommendation No. 119, in order for the worker not to have to bear alone the burden of proving that the termination was not justified, the Convention has introduced a new provision on the burden of proof. In the procedure of appeal, provision is required to be made for one or the other or both of the following possibilities: the burden of proving the existence of a valid reason for the termination shall rest on the employer, or the competent appeal body shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

7. A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

8. In order to ensure a certain level of income protection for a worker whose employment has been terminated, the Convention also provides that the worker shall be entitled to a severance allowance or other separation benefits, or benefits from unemployment insurance or other social security benefits, or a combination of such allowance and benefits.

9. In accordance with the supplementary provisions of the Convention concerning terminations of employment for economic, technological, structural or similar reasons, the employer who contemplates such terminations shall provide the workers' representatives concerned in good time with relevant

information and give them an opportunity for consultation on measures to avert or minimize the terminations and measures to mitigate their adverse effects. The employer shall also notify the competent authority of such terminations as early as possible, giving relevant information.

10. Recommendation No. 166 sets forth a number of provisions supplementing those in the Convention. With respect to justification for termination, in addition to the reasons mentioned by the Convention, the Recommendation lists two further grounds which should not constitute valid reasons for termination: age (subject to national law and practice regarding retirement) and absence from work due to compulsory military service or other civic obligations.

11. With regard to the procedure prior to or at the time of termination, the Recommendation makes provision for appropriate written warning before a worker's employment is terminated for misconduct (of a kind that would justify termination only if repeated), as well as for appropriate instructions, written warning and a reasonable period of time for improvement before a worker's employment is terminated for unsatisfactory performance. A worker should be entitled to be assisted by another person when defending himself against allegations regarding his conduct or performance. The Recommendation also provides for notification in writing of a decision to terminate employment and, on request, a written statement of the reason for the termination.

12. A worker should be entitled to reasonable time off from work without loss of pay during the period of notice for the purpose of seeking other employment and to a certificate of employment specifying the dates of engagement and termination of employment and the type or types of work on which he was employed.

13. The Recommendation contains a number of more detailed provisions concerning terminations of employment for economic, technological, structural or similar reasons which provide useful suggestions for the application of the Convention. All parties concerned should seek to avert or minimize as far as possible such terminations and to mitigate the adverse effects of any terminations on the workers concerned; where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the envisaged terminations of employment.

14. The employer should consult the workers' representatives when he contemplates the introduction of major changes in the undertaking that are likely to entail terminations, providing them for this purpose with all relevant information on the major changes contemplated and their effects.

15. The Recommendation proposes a number of measures which should be taken or considered with a view to averting or minimizing terminations of employment for economic and similar reasons. The selection by the employer of workers for termination for these reasons should be made according to criteria giving due weight to the interests of the undertaking and to the interests of the workers, and the workers affected should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications. With a view

to mitigating the effects of termination of employment, the Recommendation also envisages the promotion through suitable measures of the placement of the workers concerned in suitable alternative employment, retraining where appropriate, and income protection during any course of training or retraining.

Other relevant ILO instruments

16. In addition to these instruments which focus specifically on termination of employment, a number of ILO instruments, and in particular the basic instruments on the protection of human rights, provide protection in the area of employment security, for example in relation to protection against acts of anti-union discrimination [5] or against discrimination in employment or occupation, [6] maternity protection, [7] the protection of workers' claims in the event of the insolvency of their employer, [8] or part-time work. [9] Other instruments, in particular those which apply to seafarers or migrant workers or those concerning social security, in one way or another touch upon employment protection. The Committee stresses the importance for industrial relations of the instruments on collective bargaining in the present context and also in the future.

Available information and arrangement of the survey

17. For this survey, information available to the Committee consisted of 202 reports received from 107 member States communicated under article 19 of the Constitution. In accordance with its usual practice, it also used the information contained in the reports on ratified Conventions communicated under articles 22 and 35 of the Constitution. The Committee also took into account the observations of a considerable number of employers' and workers' organizations. [10] Whilst emphasizing the quality of many of the reports, the

[5] The Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Workers' Representatives Convention (No. 135), and Recommendation (No. 143), 1971; the Rural Workers' Organizations Convention (No. 141), and Recommendation (No. 149), 1975.

[6] The Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958; the Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981.

[7] The Maternity Protection Convention, 1919 (No. 3); the Maternity Protection Convention (Revised), 1952 (No. 103); and the Maternity Protection Recommendation, 1952 (No. 95).

[8] The Protection of Workers' Claims (Employer's Insolvency) Convention (No. 173) and Recommendation (No. 180), 1992.

[9] The Part-Time Work Convention (No. 175) and Recommendation (No. 182), 1994.

[10] *Austria*: the Federal Chamber of Labour; *Barbados*: Barbados Employers' Confederation, Barbados Workers' Unions; *Brazil*: "Gaucha" Association of Labour Inspectors (AGITRA); *Dominica*: the Dominica Employers' Federation, Dominica Association of Teachers; *Estonia*: Confederation of Estonian Industry, Association of Trade Unions; *Finland*: Central Organization of Finnish Trade Unions (SAK), Confederation of Unions for Academic Professionals in Finland (AKAVA); *Iraq*: Federation of Iraqi Industry, General Federation of Workers' Trade Unions;

Committee regrets that it did not always receive adequate or in some instances any information regarding practical application, and in particular legal decisions, allowing it to evaluate the implementation of certain provisions. It thus endeavoured, following its usual practice, to supplement the information received by referring to legislation, official documents and other appropriate available sources.

18. In the interests of clarity the Committee has chosen to adhere fairly closely to the order of provisions as contained in the instruments. Thus, in the following chapters the Committee examines the definition and methods of implementation (Chapter I) and the scope of the instruments (Chapter II), the obligation for termination to be justified by a valid reason (Chapter III), procedure prior to or at the time of termination and procedure of appeal against termination (Chapter IV), the period of notice (Chapter V), income protection (Chapter VI) and, finally, supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons (Chapter VII). The final chapter concerns ratification prospects as well as certain difficulties of application mentioned in this respect by governments (Chapter VIII). The Committee will also make a few final remarks by way of a conclusion to its survey.

Kenya: Federation of Kenya Employers; *Republic of Korea*: Federation of Korean Trade Unions (FKTU); *Mexico*: Mexican Confederation of Chambers of Industry (CONCAMIN), Confederation of Mexican Workers (CTM); *New Zealand*: New Zealand Employers' Federation, New Zealand Council of Trade Unions (CTU); *Portugal*: General Confederation of Portuguese Workers (CGTP-IN); *Slovakia*: Federation of Employers' Unions and Associations of the Slovak Republic, Confederation of Trade Unions; *Sri Lanka*: Employers' Federation of Ceylon, Lanka Jathika Estate Workers' Union; *Togo*: National Confederation of Workers of Togo; *Turkey*: the Turkish Confederation of Employers' Associations (TISK), the Confederation of Turkish Trade Unions (TURK-IS); *United Kingdom*: Trade Union Congress (TUC).

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CHAPTER I

Definition and methods of implementation

Definition

19. Under Article 3 of the Convention, the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer, which restricts the substantive scope of the Convention to this method of terminating the employment relationship, to the exclusion of others. Under this definition, the instruments cover termination of the employment relationship — and not other business relations — at the initiative of the employer — and not at the initiative of the worker or as a result of a genuine and freely negotiated agreement between the parties.

20. Furthermore, while the term "termination" means termination of the employment relationship and not other interruptions, as for example suspension of the employment contract, it should be noted that such suspension, for example, due to illness or maternity, is directly related to termination of the employment relationship in so far as in some countries the worker is protected against termination during the period of suspension of the contract. [1]

21. It should also be noted that the definition of termination given for the purpose of the Convention does not require countries to alter the terminology they use, provided that the substantive provisions in national law are applied to the persons covered by the instruments. [2]

22. The manner in which the termination of an employment relationship is defined is of particular importance. If, instead of dismissal, the termination of the employment relationship though really at the initiative of the employer is wrongly labelled by him for example as resignation, breach of contract, retirement, modification of the contract, *force majeure* or judicial termination, the rules of protection governing termination might apparently seem not to apply; but the use of such terminology should not enable the employer to circumvent the obligations with regard to the protection prescribed in the event of dismissal. Certain changes introduced by the employer, in particular as concerns conditions of employment and which do not arise out of genuine

[1] In the same way in some countries, the "laying off" of a worker is closely linked to a subsequent termination of employment.

[2] ILC, 67th Session, 1981, Report VIII(2), p. 29.

operational requirements, might place the worker under pressure either to accept such changes or to give up his job or incur the risk of being sanctioned for having disregarded the employer's instructions. It is therefore necessary to be able to verify whether a situation does not constitute a disguised dismissal or a real termination of the relationship instigated by the employer in the sense of the Convention, since otherwise the worker concerned would de facto or *de jure* be unduly deprived of the protection provided by the Convention. [3]

Methods of implementation

23. Article 1 of the Convention stipulates that "the provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations". [4] Article 1 applies to all the provisions contained in the Convention. [5]

24. The Convention leaves to the ratifying State the choice between the different methods of implementation in accordance with national practice, taking account of national differences in the regulation of relations between employers and workers, thus affording considerable flexibility in applying the instrument. If one or more provisions of the Convention are not applied or are applied only partially by means of collective agreements, judicial decisions or other methods, the ratifying State has the obligation of implementing the provision(s) through legislation. [6]

25. It should be noted that the methods to which reference is made in Article 1 of the Convention are not equally suitable for giving effect to the Convention in all fields and for all the persons concerned. Thus, for example,

[3] If the employer makes the working conditions of a worker so intolerable that the latter is forced to resign, the employer commits what is called in some countries a "constructive discharge" and the worker may take legal proceedings as if he had been dismissed by the employer (for example: *United States*).

[4] Recommendation No. 166, like Recommendation No. 119 of 1963, stipulates that its provisions may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions (Paragraph 1). It therefore places various methods, including legislation, on an equal footing. Furthermore, it refers explicitly to works rules as one of the possible methods of implementation.

[5] ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/5, para. 33.

[6] ILC, 68th Session, 1982, Report V(2), p. 12. In reply to a suggestion by the Government of *Switzerland* that collective agreements should play the primary role in the implementation of the instrument, it was pointed out that the proposed text would not preclude such a role being played by collective agreements in a country, but that if the Convention were not implemented by collective agreements or other means, a ratifying State would be required to apply it by legislation or regulations.

although the application in this field of common law, custom or practice results in the enunciation of certain principles for specific cases, such as the right to damages for breach of contract in the event of termination without notice where the worker is not guilty of serious misconduct (wrongful dismissal), they cannot provide the full scope of the protection prescribed by the Convention. Some of the provisions of the Convention which concern, for example, the protection of income or measures in the event of collective termination, generally presuppose the existence of legislative standards and administrative machinery. In countries where there is no legal protection and where collective agreements are not of general application, substantial numbers of workers may be denied the protection prescribed by the Convention, although the scope of the latter is general and, unless certain flexibility clauses are applied, covers all employed persons. [7]

26. Although the substantive scope of the Convention is determined by the definition contained in Article 3, it should be pointed out that its provisions relate not only to labour law, but also to such other areas as human rights, appeals procedures before judiciary bodies, social security and employment. This is reflected in the sometimes detailed sources of law mentioned by governments. [8]

27. In the large majority of the countries examined, termination of employment is regulated by legislation, frequently in laws of general scope, such as labour codes, [9] labour acts [10] or civil codes, [11] and also in special legislation dealing for example with employment [12] or individual employment relationships, [13] or in legislation specifically concerned with termination of employment [14] or even in constitutional provisions. [15] In most cases, several

[7] See below, Ch. II.

[8] Given their diversity and number, the Committee cannot provide a detailed list in this report. It proposes to indicate some of the sources by way of example in its examination of the application of the substantive provisions of the Convention.

[9] For example: *Burundi*: Legislative Decree No. 1/037 of 7 July 1993 to revise the Labour Code; *Cameroon*: Act No. 92/007 of 14 Aug. 1992 to promulgate the Labour Code; *France*: Labour Code of 1973, as amended; *Hungary*: Act No. 22 of 1992 to promulgate the Labour Code; *Islamic Republic of Iran*: Labour Code of 20 Nov. 1990; *Paraguay*: Act No. 213 of 1993 to promulgate the Labour Code.

[10] For example: *Equatorial Guinea*: Act No. 2/1990; *Mexico*: Federal Labour Act of 1969; *Nepal*: Labour Act of 15 May 1992.

[11] For example: *Netherlands*: Civil Code (BW).

[12] For example: *Argentina*: National Employment Act, No. 24013 of 5 Dec. 1991; *Peru*: Employment Promotion Act, No. 728, as amended, approved by Presidential Decree No. 003-93-TR of 22 Apr. 1993.

[13] For example: *Italy*: Act No. 108 of 11 May 1990 to regulate the dismissal of individual employees.

[14] For example: *Netherlands*: Act respecting the notification of collective dismissals.

[15] For example: *Brazil*: article 7.I of the Constitution of 1988.

texts must be taken together for an overall view of the situation, [16] including for example provisions respecting labour relations, protection of workers' income in the event of unemployment, as well as constitutional provisions, in particular as regards non-discrimination or equality. [17]

28. In many cases, collective agreements supplement basic legislative provisions. [18] In some countries they are extended to a large number of employees by a declaration of general application when they are concluded between the central organizations of employers and workers. [19] Collective agreements or individual contracts may not establish less favourable provisions for workers than those contained in the legal provisions on termination of employment. [20]

29. Collective agreements are still, in some countries, the main source of protection for workers against termination of employment. [21] Their scope is often limited to a part of the workforce, with the rest being subject to the principles of common law, custom and practice, as in the *United States*. In *Canada*, legislation introducing a minimum statutory notice period in the event of termination of employment has been adopted both at the federal and provincial levels. The *United States*, except the State of Montana, have not adopted any general legislation against unjustified dismissal; collective agreements regulate this matter for some workers, with the rest being subject to

[16] For example: *Austria*: Civil Code, Regulations on commerce, Employees Act, Works Constitution Act, and several provisions applicable to different categories of workers.

[17] For example: Constitutions of *Brazil* (1988), *Colombia* (1991), *Paraguay* (1992). For a detailed examination of these provisions, see *Equality in employment and occupation*, ILC, 75th Session, 1988, Report III (Part 4B).

[18] For example in *Germany*, where dismissals are regulated by the Protection against Dismissal Act, the Civil Code, various individual Acts and the Works Constitution Act, at the end of 1993 there were approximately 4,500 framework collective agreements, 13,000 agreements for most branches and regions and 3,200 works agreements; approximately 90 per cent of workers were thus covered by collective agreements; *United Kingdom (Montserrat)*: the Government provided extracts of collective agreements concluded by the Allied Workers' Union with the water and electricity services and a bank.

[19] For example: *Senegal, Niger* (interoccupational collective agreements).

[20] For example: *Germany*; *Spain*: Act to establish a Worker's Charter, No. 8/1980, as amended: the rights and obligations under the employment relationship are regulated by legal provisions and regulations, collective agreements, the determination of the parties (the conditions established by the employment contract may not be less favourable than or contrary to legal provisions and collective agreements), local customs and occupational practices. In the event of conflicting legal provisions, those which are most favourable to the worker apply; *Venezuela*: the provisions of the Organic Labour Act are binding; agreements may accord conditions more favourable to the worker, which modify general rules while respecting their purpose; s. 10 of the Organic Labour Act of 1990.

[21] For example: *Denmark, Zambia*.

common law.[22] However, it should be noted that in this country constitutional or legislative provisions on the protection of human rights and protection against unfair labour practices, which are of general application, have provided protection against termination of employment on grounds considered to be unjustified, not only for workers covered by collective agreements, but also for other workers. Furthermore, case-law has moved towards the protection of workers.[23] This is also the case in *Canada*. In other countries, such as *Sweden* or *Italy*, basic collective agreements negotiated between the central organizations of employers and workers have been supplemented or replaced by legal provisions. In *New Zealand*, legislation on individual contracts has replaced the previous system based on collective agreements and arbitration awards.[24] The Committee notes that the observations made by the New Zealand Council of Trade Unions (CTU) draw attention to certain gaps in the law as regards equality of protection and access to remedy procedures, advance notice, consultation prior to collective dismissals and compensation. The CTU states in particular that the Act emphasizes the negotiation of employment contracts by individuals or isolated groups and places barriers in the way of effective collective action. According to the CTU, since 1991 workers have been less able to ensure that their employment contracts make provision for these issues.

30. As regards the works rules mentioned among the methods of implementation in Paragraph 1 of Recommendation No. 166, they establish enterprise regulations and procedures which often cover disciplinary sanctions, including termination, as well as staff reductions in some cases. As in the case of collective agreements, it may prove difficult to rely on such rules to give effect to the Recommendation when they only cover the enterprise to which they apply. The situation would be rather different in the case of standard rules, of which each enterprise has to apply the minimum standards.

31. Mention should also be made of codes of practice adopted by some countries concerning equality of opportunity and treatment in employment, or

[22] The Government indicated in its report that in 1991, the National Conference of Commissioners on Uniform State Laws drafted a model Employment Termination Act and has recommended its adoption in all States.

[23] See below, Ch. III, paras. 83-85.

[24] Employment Contracts Act of 1991. This stipulates that every employment contract must contain personal grievance procedures, designed to encourage employers and employees to resolve grievances by discussion; if discussion is not successful, the grievant can apply to the Employment Tribunal for mediation or an adjudicated decision. Adjudicated decisions can be appealed to the Employment Tribunal and then to the Employment Court and the Court of Appeal.

labour relations in general, which deal with various aspects of the protection of employment security. [25]

32. Case-law plays a fundamental role, particularly where texts are of a more general nature or scope as regards termination of employment. In the absence of explicit provisions, judicial decisions may also establish certain general principles of law on particular questions in many of the countries.

33. Some countries adopt detailed regulations to apply standards on labour matters, including termination of employment. In *Venezuela*, for example, the Organic Labour Act provides that in the event of conflicting laws, labour law, whether substantive or procedural, prevails. In case of doubt concerning the application of various provisions that are in force, or in the interpretation of a particular provision, the one most favourable to the worker is applied. Binding constitutional and legal provisions are supplemented, for the resolution of individual cases, by the following, in order: (a) the collective labour agreement or arbitration award, where applicable; (b) the contract of employment; (c) the principles underlying labour legislation, as explicitly or implicitly contained in constitutional declarations, the Conventions and Recommendations adopted by the International Labour Organization and national case-law and jurisprudence; (d) custom and practice, in so far as they do not conflict with the above legal provisions and principles; (e) the universally recognized principles of labour law; (f) general legal standards and principles; and (g) equity. [26] In *Belarus*, the Labour Code provides that, when the Republic has adhered to an international treaty (agreement or Convention) which establishes rules that are different from those prescribed by the Code, the rules of the treaty (agreement or Convention) are applied. [27] In *Ecuador*, in the event of doubt concerning the scope of the provisions of the Labour Code, the courts shall apply them in the manner most favourable to the workers. [28] The same principle applies in *Brazil*.

[25] For example: *Mauritius*: the code of practice appended to the Industrial Relations Act stipulates in particular that policy on staff reduction must be prepared in advance; in any procedure under the Industrial Relations Act, the code of practice will be taken into consideration; *United Kingdom*: code of practice adopted by the Commission for Racial Equality for the elimination of racial discrimination and the promotion of equality of opportunity in employment; code of practice adopted by the Equal Opportunities Commission for the elimination of discrimination on the grounds of sex and marriage and the promotion of equality of opportunity in employment.

[26] ss. 59 and 60 of the Organic Labour Act of 1990.

[27] s. 4 of the Labour Code, as amended on 15 Dec. 1992.

[28] s. 7 of the Labour Code of 1978.

CHAPTER II

Scope of the instruments as regards individuals

34. The Convention[1] applies to all branches of economic activity and to all employed persons (Article 2, paragraph 1). These terms refer to all persons in an employment relationship. The Convention applies to both foreign and national employed persons. It also covers public servants, who may, however, be excluded from its scope under certain conditions; it should be noted that the very purpose of the Convention rules out its application to self-employed persons.[2] Although the scope of the Convention is very broad, it does at the same time afford a great deal of flexibility: having laid down the principle of general application, it offers ratifying States the option of excluding certain types or categories of workers (Article 2, paragraphs 2 to 6). Such exclusions are based on the nature of the contract of employment or the category of workers concerned. The Committee points out that the exclusions may be made with respect to all or some of its provisions. However, the Convention makes this possibility of exclusion subject to adequate safeguards in the case of exclusions based on the nature of the contract of employment. It lays down procedures, conditions and criteria, including consultation with employers' and workers' organizations, for the exclusion of certain permitted categories of employed persons "in so far as necessary". The report form calls for precise information on the application of these flexibility clauses, since it is important to ensure that recourse to the possibilities of exclusion does not have the effect of avoiding the protection or unduly limiting the scope of the instruments.

Exclusions based on the nature of the contract of employment

35. Under Article 2, paragraph 2, of the Convention,[3] the following categories of employed persons may be excluded from all or some of its provisions:

[1] See also Para. 2(1) of the Recommendation.

[2] ILC, 68th Session, 1982, Report V(2), p. 16.

[3] See also Para. 2(2) of the Recommendation.

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

36. Article 2, paragraph 3, of the Convention[4] provides that adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Convention.[5] From the information available, it is clear that workers engaged under the types of contracts referred to in Article 2(2) of the Convention generally do not enjoy the same protection as those employed under a contract of indeterminate duration.

Workers engaged under a contract of employment for a specified period of time or a specified task

37. In many countries a distinction is drawn between contracts for a specified period or task and those of indeterminate duration, with the general rules governing unjustified dismissal often applying only to termination of the latter.[6] In others, the general legislation on dismissal is applied, with special provisions concerning the amount of compensation to be paid if the contract is terminated by the employer before its expiry,[7] in which case the employer may be obliged to pay damages to the worker.[8] During the term of their contract, workers who are engaged under a contract for a specified period are generally in a better position as regards job security than those under a contract of indeterminate duration, since the normal dismissal procedures are not applicable. For example, in *France*, unless otherwise agreed by the parties, a contract of employment for a specified period may be terminated before its expiry only in the event of serious misconduct or *force majeure*. Case-law does not recognize economic difficulty as constituting *force majeure*;[9] moreover, in the event of termination for serious misconduct, the provisions governing disciplinary

[4] See also Para. 3(1) and (2) of the Recommendation.

[5] Paragraph 3(2) of the Recommendation gives examples of such safeguards. See below para. 46, note 30.

[6] For example: *Cyprus*, *Gabon*.

[7] For example: *Portugal*.

[8] For example: *France*: s. L.122-3-8 of the Labour Code. The Committee noted in a previous general survey that even if workers employed under contracts for a specified period or task are not covered by the relevant provisions during the currency of their contract, termination by the employer before expiration of the specified period or performance of the specified task generally entitles the worker to recover damages for breach of contract. ILC, 59th Session, 1974, Report III (Part 4B), para. 20.

[9] *France*: s. L.122-3-9 of the Labour Code and *Cass. Soc.*, 28 Apr. 1986.

measures apply, in particular the requirement for a preliminary interview. [10] In other countries, workers engaged under a contract for a specified period may be dismissed with notice during the term of their contract for reasons identical to those applicable in the case of an employment relationship of indeterminate duration. [11] Finally, in other countries, under certain conditions the legislation respecting unjustified dismissal even applies to the non-renewal of contracts for a specific period. [12]

38. As regards contracts for a specified task, detailed provisions are sometimes laid down regarding the procedures for their conclusion and extension. Thus, for example, in *Venezuela* this type of contract must define in precise terms the task a worker is to perform. If, within a month of the completion of the contract for that task, the parties conclude a new contract, it will be understood that they intended to contract for an indeterminate duration from the outset of the relationship. [13]

Workers serving a period of probation

39. The purpose of a probation period is normally to enable the parties to make an assessment of the advantages resulting from the conclusion of an employment contract. As stated, for example, in the Labour Code of *Senegal*, "engagement on probation means that the employer and the worker, with a view to concluding a definitive contract ... decide beforehand to assess, inter alia, the first, the quality of the worker's services and output, and the second, the conditions of work, life, remuneration, safety and health and the social climate". [14] During this period, the worker has to demonstrate his professional abilities; it is a period of insecurity which should not be unduly prolonged. [15]

40. The Convention allows workers serving a period of probation to be excluded from its protection on condition that such period is determined in advance and is of reasonable duration. During the preparatory work, it was pointed out that the periods considered reasonable varied considerably from one country to another and sometimes from one category of workers to another and that it was therefore not possible to define the concept of "reasonable duration".

[10] *France*: ss. L.122-3-3, L.122-3-8 and L.122-4.

[11] For example: *Brazil, Czech Republic*.

[12] For example: *United Kingdom*.

[13] *Venezuela*: s. 75 of the Organic Labour Act of 1990.

[14] For example: *Senegal*: s. 39 of the Labour Code; *Colombia*: s. 76 of the Labour Code: the law defines the probation period as "the initial stage of the employment contract, whose purpose is to enable the employer to assess the worker's abilities and the latter to judge whether the working conditions suit him".

[15] For example, *Brazil*: the period of protection is limited to 90 days; *France*: in the absence of a contractual clause relating to the existence of a probation period, the contract must be considered as firm from the first day, except as provided otherwise in a collective agreement or by custom (*Cass. Soc.*, 29 June 1959).

It is for each country ratifying the Convention to determine the periods considered to be reasonable, subject to the requirement that this determination is made in good faith. [16] It follows from the concept itself of a probation period that it should be limited in time. The Convention requires that the duration be determined in advance, in particular so that the worker is aware of the conditions under which he is engaged, and so that the period cannot be unduly prolonged. It should also be pointed out that collective agreements sometimes fill in the gaps left by legislative provisions, in particular where there are no general provisions concerning the probation period. Where the provisions of legislation or collective agreements allow renewal of the probation period, the total duration must be reasonable and determined in advance.

41. Workers employed for a probation period are often excluded from the scope of the relevant provisions concerning termination of employment. [17] The probation period laid down in national provisions varies for the most part from several weeks to several months, depending, in particular, on the nature of the job and the qualifications required. [18] It is sometimes specified that the probation period cannot exceed a certain duration, including renewal. [19] A contract for a probation period must generally be in writing, [20] and the continuation of services after the expiry of the probation period without a new contract being drawn up is equivalent to the conclusion of a contract of indeterminate duration which takes effect on the date on which the probation period began, [21] or, where the worker continues to work after the probation

[16] ILC, 68th Session, 1982, Report V(2), p. 16.

[17] For example: *Burkina Faso*: s. 40 of the Labour Code, 1990; *Finland*: an employment relationship for a trial period may be terminated without valid grounds for rescission or termination, but not on discriminatory or irrelevant grounds; *France*: ss. L.122-4 and L.122-25 of the Labour Code: the rules governing termination of contracts of employment for an indeterminate period do not apply during the probation period. However, employers must not use the fact that a woman is pregnant as a ground for terminating her contract of employment during a period of probation; *Portugal*: s. 55 of Legislative Decree No. 64-A/89: during the probation period a contract may be terminated without the need for giving valid grounds and without compensation.

[18] For example, *Colombia*: s. 79 of the Labour Code: the period cannot exceed two months. In the case of contracts concluded for a specified period, it cannot exceed one-fifth of the term of the contract, up to a maximum of two months. In the case of successive contracts between the same employer and the same worker, a probation period can only be required for the first contract; *Finland*: between four and six months; the Central Organization of Finnish Trade Unions (SAK) emphasized the importance of not lengthening the trial period in the future; *Hungary*: s. 81 of Act No. 22 of 1992 to promulgate a Labour Code: 30 days; *Senegal*: The interoccupational collective agreement provides for periods varying between eight days and three months, depending on the category of worker. It may be renewed once, provided that the parties so agree in advance.

[19] For example: *Gabon*: ss. 27 and 28 of the Labour Code.

[20] For example: *Colombia*: s. 77 of the Labour Code; *Ethiopia*: s. 11(3) of Proclamation No. 42 of 1993; *Senegal*: s. 40 of the Labour Code.

[21] For example: *Cameroon*: s. 28(5) of Act No. 92/007 of 1992 to promulgate the Labour Code; *Gabon*: s. 29 of the Labour Code; *Senegal*: s. 42 of the Labour Code.

period, the contract is deemed to have been concluded on the date on which the probation period began.[22] In some countries, a contract for a probation period cannot be concluded in certain circumstances.[23]

Workers serving a qualifying period of employment

42. The Convention also allows the exclusion of workers serving a qualifying period of employment required by national provisions in order to enjoy certain forms of protection. As in the case of the probation period, the Convention requires that this period be determined in advance and of reasonable duration. Such qualifying periods[24] vary from one country to another, from a few months[25] to several years.[26] According to the Government of the *United Kingdom*, the qualifying period is normally two years. However, a person may make a complaint to an industrial tribunal without having completed the qualifying period in the case of dismissal on grounds of race (*Great Britain*), religious belief or political opinion (*Northern Ireland*), sex, marital status, trade union membership, non-membership or activities and, under the Trade Union Reform and Employment Rights Act of 1 July 1993, dismissal for raising health and safety concerns (in the case of representatives or other workers recognized as having safety and health duties), for pregnancy or for having exercised the right to maternity leave, or, in general, for having sought in good faith to enforce a statutory employment protection right. The Trades Union Congress (TUC) stated in its comments that the latest reforms introduced in 1993 had been forced on the Government and, more specifically, as regards maternity-related dismissal, after a judgement of the Court of Justice of the European Communities found that dismissal for maternity-related reasons constituted sex discrimination.[27] The TUC states that the qualifying period, which was six months in 1979, was extended to one, then to two years. According to the TUC, large numbers of workers are dismissed in the 51st week of the second year of the qualifying period and then re-employed several weeks later, so that they can

[22] For example: *Ethiopia*: s. 11(7) of Labour Proclamation No. 42 of 20 Jan. 1993.

[23] For example: *Czech Republic*: a contract for a probation period cannot be concluded in cases where the law forbids contracts for a specified period, i.e. for school graduates, young workers and workers with disabilities.

[24] During the preparatory work, the French term that was initially proposed — "période de stage" — was replaced by the term "période d'ancienneté requise". The English version, *qualifying period*, remained unchanged.

[25] For example: *Austria*: s. 105(3) of the Works Constitution Act: six months; *Germany*: under s. 1 of the Protection against Dismissal Act, dismissal must be socially justified, but such protection only applies to contracts for an unspecified period that have lasted six months without interruption; *Sri Lanka*: 12 months.

[26] For example: *Canada*: It is one year under the Canada Labour Code and ten years in the Province of Nova Scotia; in the Province of Quebec, the period of continuous service has been reduced from five to three years.

[27] Webb v. EMO Air Cargo Ltd. (C.32/93).

never gain employment protection rights. This is why the TUC does not share the Government's view that the qualifying period helps maintain jobs.

43. It is for each country to determine within the spirit of the Convention what is reasonable. The Committee considers that an excessively long qualifying period may result in denial to a large number of workers of the protection laid down in the Convention.

Workers engaged on a casual basis for a short period

44. Workers engaged on a casual basis for a short period may also be excluded. Such workers are sometimes treated in the same way as those engaged under a contract for a specified period or a specified task. In some cases, these contracts are concluded to meet the temporary needs of the enterprise; sometimes legislation specifies that these must be activities other than normal activities and sets an upper limit on their duration. In Peru, for example, a casual contract, which is one of the types of temporary contracts, is defined as a contract concluded to meet temporary needs that are distinct from the normal activity of the workplace. [28]

Safeguards in the case of contracts of employment for a specified period

45. When workers are excluded from all or some of the provisions of the Convention under Article 2 (2), adequate safeguards shall be provided, in accordance with paragraph 3, against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Convention. [29]

46. In many countries, provisions have been adopted to prevent recourse to successive contracts for a specified period as a means of avoiding the guarantees applicable to contracts of indeterminate duration. Some legislation contains one or more of the measures advocated by the Recommendation [30] or

[28] *Peru*: s. 103 of the Employment Promotion Act (Presidential Decree No. 003-93 TR of 22 Apr. 1993).

[29] This paragraph was proposed by a working party during the second discussion of the proposed Convention to replace a text that had been adopted by the Committee, consisting of adding at the end of Article 2(2)(a) the phrase "when, owing to the nature of the work to be effected, the employment relationship cannot be of indeterminate duration".

[30] The Recommendation refers to the same principle as the Convention and, in Paragraph 3(2) suggests a number of measures that may be taken for this purpose, such as: (a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration; (b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph to be contracts of employment of indeterminate duration; (c) deeming contracts for a specified period of time, when renewed on one or more occasions,

provides for other forms of safeguards, sometimes in combination, such as provisions to the effect that contracts for a specified period cannot be used to fill permanent posts on a long-term basis.[31] In countries where there are restrictions on the conclusion of contracts for a specified period, the cases in which such contracts may be concluded are often specified in a limitative list[32] and relate to one or other of the cases set out in Paragraph 3(2) of the Recommendation.

47. As regards the nature of the work and the circumstances in which it is performed, contracts may generally be concluded in order to temporarily replace a permanent employee,[33] for work that is of a temporary nature or for a specified task.[34] Sometimes reference is made to activities that are traditionally carried out on a temporary basis, such as construction[35] or

other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

[31] For example: *Dominican Republic*: ss. 26, 33 and 34 of the Labour Code of 1992: where the nature of the work is permanent, the contract is concluded for an unspecified period (however, there is no reason why the employer cannot undertake to use the workers' services for a specified period). Every contract is presumed to be of indeterminate duration, and the cases in which a contract may be concluded for a specified period are laid down in a limitative list and relate to the nature of the work, the worker's interests and temporary replacement of a permanent worker. *France*: ss. L.122-1, L.122-1-1 and L.122-2 of the Labour Code: a contract of employment for a specified period cannot have the aim or the effect of filling in the long term a position related to the normal and permanent activity of the enterprise. With certain exceptions, it can only be concluded for the performance of a specific temporary task and only in cases laid down in a limitative list.

[32] For example: *Brazil, Dominican Republic, France*.

[33] For example: *Croatia*: s. 12 of the law on basic employment rights; *Dominican Republic*: s. 33(2) of the Labour Code: "temporary replacement of a worker in the event of leave, annual leave or any other temporary absence"; *Ethiopia*: s. 10(2) of Labour Proclamation No. 42 of 1993: "replacement of a worker who is temporarily absent due to leave or sickness or other causes"; *Spain*: s. 15(1)(c), of the Worker's Charter, as amended: "when its purpose is to replace workers whose job is reserved, a contract must specify the name of the person replaced and the reason for the replacement".

[34] For example: *Dominican Republic*: s. 33(1) of the Labour Code: "if it is appropriate to the nature of the service to be performed"; *Spain*: s. 15(1)(a) of the Worker's Charter: collective agreements may identify specified work for this purpose.

[35] For example: *Canada* (Provinces of Alberta and British Columbia); *Venezuela*. Conversely, in the *Philippines*, construction workers may be considered as regular employees where their aggregate period of continuous employment is at least one year and no "day certain" has been agreed upon. In this case they enjoy security of employment and are entitled to severance pay (Department Order No. 19 of 1993: Guidelines governing the employment of workers in the construction industry).

seasonal work.[36] In the *Dominican Republic*, however, seasonal contracts in the sugar industry are deemed to be contracts of indeterminate duration and are subject to the rules applicable to such contracts in the event of termination, except where otherwise provided in the legislation or collective agreement.[37]

48. Sometimes contracts for a specified period are concluded in the event of a temporary increase in the activity of the enterprise[38] or where made necessary by market conditions, the workload or excessive demand, even where the normal activity of the enterprise is concerned.[39]

49. In a number of countries, the legislation allows the conclusion of contracts for a specified period if this is considered to be in the worker's interest, under the same terms contained in the Recommendation,[40] to encourage the recruitment of workers,[41] to provide employment to unemployed persons or offer additional training to enable the workers to acquire the necessary skills to become re-employed.[42] This type of contract includes those known as re-entry contracts, job training and retraining contracts, job orientation contracts and skill acquisition contracts.

50. However, in a number of countries, where restrictions are placed on the use of contracts for a specified period in order to ensure that they are not misused, the provisions in force often limit the duration and renewal of contracts, and under certain conditions assimilate them to contracts of indeterminate duration, in particular when they have been renewed on one or

[36] For example: *Croatia*; *France*: s. L.122-1-1, para. 3, of the Labour Code: seasonal jobs or for jobs, in certain sectors determined by decree or to which a collective agreement has been declared applicable, in which it is regular practice not to resort to contracts of indeterminate duration on account of the nature of the activity carried out and the temporary nature of the jobs themselves.

[37] ss. 29 and 30 of the Labour Code.

[38] For example: *Burundi*: s. 26 of Legislative Decree No. 1/037 of 7 July 1993 to revise the Labour Code: the list of cases in which contracts for a specified term may be concluded is not limitative; for example, such contracts may be concluded in the event of an exceptional or unusual increase in work; *Cameroon*: s. 25(4)(b) of Act No. 92/007 of 14 Aug. 1992 to promulgate the Labour Code: in order to deal with a cyclical and unforeseen increase in the activities of the enterprise or to perform urgent work to avert imminent accidents, organize rescue work or undertake repairs on equipment, plant or buildings of the enterprise involving a hazard for the workers; *France*: s. L.122-1-1, clause 2, of the Labour Code; *Portugal*.

[39] For example: *Spain*: s. 15(1)(b) of the Worker's Charter: the six-month upper limit on a contract in any period of 12 months may be changed by collective agreement.

[40] For example: *Dominican Republic*: s. 33(3) of the Labour Code.

[41] For example: *Portugal*.

[42] For example: *France*: s. L.122-2 of the Labour Code.

more occasions.[43] In *Mali*, the new Labour Code provides that the duration of such contracts cannot exceed two years, and that a worker cannot renew a contract for a specified period with the same enterprise more than twice.[44] In this country, and in certain others, a contract for a specified period must be concluded in writing, failing which it is deemed to be of indeterminate duration.[45] This is also the case in *France*, for example, where protection was strengthened in 1990: the contract must be drawn up in writing and must clearly indicate its purpose, failing which it is "deemed" to be of indeterminate duration.[46] In this country, contracts for a specified period are prohibited in certain specific cases, such as the replacement of an employee whose contract was suspended as the result of a collective labour dispute, or to perform particularly hazardous work.[47] In another country, where there is a two-year upper limit on contracts for a specified period, 30 days' advance notice must be given of termination of the contract, failing which the contract is deemed to be of indeterminate duration.[48]

51. The bodies competent to hear workers' appeals may reclassify contracts for a specified period as contracts of indeterminate duration. In *Cyprus*, for example, the Industrial Disputes Court took into account criteria such as the total length of the period of service, whether or not the employee knew at the time of his engagement that his contract would be of fixed duration,

[43] For example: *Russian Federation*: s. 30 of the Labour Code: if, upon expiry of an employment contract, the employment relationship continues in practice and neither of the parties has asked for it to be terminated, the validity of the contract is deemed to be of indeterminate duration, *Tunisia*: s. 17 of the Labour Code: when, upon expiry of the agreed term, the worker continues to perform his services without any objection from the other party, the contract is converted to a contract of indeterminate duration.

[44] *Mali*: ss. L.20 and L.21 of Act No. 92-020 of 23 Sep. 1992 to promulgate a Labour Code; *Cameroon*: s. 25(1)(a) and (3) of Act No. 92/007 of 14 Aug. 1992 to promulgate the Labour Code: the contract is concluded for a two-year term and may be renewed for the same period; if the worker is a Cameroon national, it cannot be renewed more than once with the same enterprise. Once this renewal has expired and if the employment relationship continues the contract becomes a contract of indeterminate duration; *France*: ss. L.122-1-2 and L.122-3-10 of the Labour Code: the maximum duration of the contract, including renewal, cannot exceed 18 months, except in specified cases; if the contractual relationship continues after the term of the contract has expired, it becomes a contract of indeterminate duration; *Madagascar*: s. 23 of the Labour Code: after two successive renewals, without any interruption of work, the contract becomes a contract of indeterminate duration; *Spain*: s. 15(3) of the Worker's Charter: temporary contracts concluded in circumvention of the law are deemed to be of indeterminate duration.

[45] *Mali*: op. cit., s. L.21.

[46] *France*: s. L.122-3-1 of the Labour Code (as amended by Act No. 90-613 of 12 July 1990): these provisions were enacted in order to protect the employee, who alone is entitled to bring a complaint in the event of non-observance (*Cass. Soc.*, 22 June 1994).

[47] *France*: s. L.122-3 of the Labour Code; *Germany*: in Germany specific reasons are required for the conclusion of a contract for a specified period.

[48] *Ecuador*: s. 184 of the Labour Code, as amended by Act No. 133 of 1991.

extension of employment after the end of a fixed-term contract and the number of times the contract was renewed.[49]

52. The Committee points out that, while a considerable number of countries make provision — sometimes in detail — for safeguards against recourse to contracts for a specified period aimed at avoiding the protection of the Convention, in others little, if any, restriction is placed on this type of contract,[50] and new types of contract for a specified period have emerged in recent years. In *Argentina*,[51] *Spain* and *Peru*, special forms of contract apply, for example, when a new activity is launched. In *Spain*, the duration of such contracts cannot exceed three years, but they can be extended for certain specified minimum periods.[52] In *Peru*, the Employment Promotion Act distinguishes between nine categories of contracts of employment that are "subject to certain conditions".[53] In addition, special provisions apply to contracts linked to the export of non-traditional products, contracts for work performed in export processing zones and under other special conditions.[54]

53. The Committee notes that several workers' organizations have expressed concern at the growing tendency to use forms of contract for specified periods. The Central Organization of Finnish Trade Unions (SAK) states that current plans to amend the Contracts of Employment Act would not be in conformity with the instruments, and the Confederation of Unions for Academic

[49] *Tunisia*: case-law has adopted a restrictive attitude to the definition of a contract for a specified period.

[50] For example, *Colombia*: s. 46 of the Labour Code, as amended by Act No. 50/90: a contract of determinate duration, which must always be in writing, cannot exceed three years although it may be renewed indefinitely. If the first contract has a term of under one year, it can be renewed three times for the same period, and subsequently only for a duration of over one year; *Venezuela*: s. 74 of the Organic Labour Act of 1990: a contract concluded for a specified period ends with the expiry of the agreed term and does not cease to be a contract for a specified period if it is extended.

[51] *Argentina*: s. 47 of the National Employment Act, No. 24013 of 1991.

[52] During the examination of the application by *Spain* of Convention No. 158 by the Committee on the Application of Standards of the International Labour Conference, the Spanish Government stated that all contracts have to meet a specific purpose and be concluded in writing and that they are redefined as contracts of indeterminate duration in the event of failure to adhere to the formalities, requirements and purposes laid down, and that the conversion of temporary contracts into contracts of indeterminate duration is encouraged. The legislative framework and information system are as detailed as possible in order to prevent misuse of temporary contracts. ILC, 81st Session, 1994, *Provisional Record*, p. 25/122.

[53] Temporary contracts (contract to set up or launch a new activity, contract to meet market demand, contract for the restructuring of an enterprise); incidental contracts (casual contract, replacement contract, emergency contract); contract for a task or service (contract for a specific task or service, intermittent contract and seasonal contract), ss. 96-117 and s. 125 of the Employment Promotion Act (Consolidation).

[54] *Peru*: ss. 123, 124 and 125 of the Employment Promotion Act. Moreover, any other type of service subject to special provisions may be contracted where it is of a temporary nature and of a duration adapted to the service to be performed.

Professionals (AKAVA) in *Finland* raised the problem of "chains" of fixed-term contracts, both to replace employees and for persons engaged for many years under contracts for a specified period, despite the fact that they carry out the same work. [55]

54. During the examination of the application by *Spain* of the Convention, the Workers' members of the Committee on the Application of Standards, noting the large proportion of temporary contracts (more than one-third of total employment), considered that special attention should be given to the establishment of safeguards against abuse of this type of contract. [56]

55. During the examination of the same case, the Employers' members of the Committee stated that the logic of the Convention consisted, on the one hand, of the possibility of excluding temporary contracts from its scope and, on the other, of requiring safeguards to be provided to prevent recourse from being had to such contracts to avoid the protection resulting from the Convention, but they considered that it would be difficult to determine how many temporary contracts would constitute a violation of this provision of the Convention. They noted further that the increasingly frequent use of temporary contracts seemed necessary in view of the changes in national economies.

56. The Committee points out that, although the presumption that contracts of employment were of indeterminate duration used to be the rule in many countries, it is now being called into question in many ways, and there has been a proliferation of new types of contract for a specified period. Some already existed, but were often of only limited character (for example, seasonal or casual work, etc.). Other types have emerged, for example, with the development of new activities or export processing zones. Some temporary or precarious contracts have been developed by employment policy measures, including training-cum-employment contracts and job training contracts, as the recession took hold in certain countries, competition grew fiercer and solutions were sought through increased employment flexibility. Contracts for a specified period therefore play a varying and somewhat ambiguous role: they can lead to recruitment or just as easily be a means of exclusion from stable employment. [57] When they are misused, their use is likely to impair the protection provided for by the Convention. The Committee notes that there is a recent trend to substitute employment contracts by self-employment so as to avoid the protection under the Convention. It is for the supervisory bodies to ensure that neither the letter nor the spirit of the standard laid down in the Convention is violated. In general, the Committee can only hope that governments will base measures to increase the flexibility of employment

[55] *Finland*; *Mauritius*: the provisions of the Labour Act do not apply to export processing zones except in the case of unjustified dismissal. New sectors were integrated into the export processing zone sector by the Industrial Expansion Act, 1993.

[56] ILC, 81st Session, 1994, *Provisional Record*, p. 25/123.

[57] For a detailed discussion of this subject, see *France: Travail et emploi*, Nos. 52/1992 and 58/1994.

relationships on a tripartite dialogue, taking into consideration the interests of the social partners[58] and of society.

Exclusion of certain categories of workers

Persons working under special arrangements

57. Under Article 2(4) of the Convention,[59] "in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which, as a whole, provide protection that is at least equivalent to the protection afforded under the Convention".

58. It is clear from the preparatory work for the Convention that the possibility of excluding these categories of employed persons from all or some of the provisions of the Convention was essentially intended for persons with the status of public servants, who in many countries enjoy job security that is at least equivalent to, or even greater than that of other employed persons. It should be pointed out in this connection that the texts initially proposed by the Office contained a reference to public servants as an illustration of the kind of category of employed persons that might be covered by this paragraph, but that this illustration was deleted in the first discussion of the text of the instruments by the competent Conference Committee, which considered that this provision was general in intent and that an example was unnecessary.[60] It is worth mentioning that in one of the preparatory reports the Office had referred to other categories of workers governed by special rules concerning termination that provide equivalent guarantees, citing seafarers.[61]

59. The Convention lays down a number of conditions for the possibility of excluding these categories of workers governed by special arrangements, in particular the obligation of consultation and the equivalence of their protection.[62]

[58] In an opinion dated 23 Feb. 1994 concerning industrial accidents and occupational diseases, the French Economic and Social Council examines certain occupational accident risk factors, noting among other things that persons employed under contracts for a specified period or on temporary assignments are, on the whole, more exposed to occupational risks than others. *Liaisons sociales*, 18 Aug. 1994.

[59] See also Para. 2(3) of the Recommendation.

[60] ILC, 67th Session, 1981, *Record of Proceedings*, p. 33/4.

[61] ILC, 67th Session, 1981, Report VIII(2), p. 24, and ILC, 68th Session, 1982, Report V(2), p. 17; however, see also below, paras. 65 and 68.

[62] As regards the obligation to report, see below, paras. 73-74.

60. Thus, firstly, exclusion measures can only be taken after *consultation* with the organizations of employers and workers concerned, where such exist. Among other matters, consultation provides a means of assessing the "necessity" of the exclusion. In previous General Surveys, the Committee has clarified the meaning of the term "consultation". It has stated that "consultation" has a different connotation from mere "information" and from "codetermination". It has also pointed out that the views expressed in the course of consultations are not a form of participation in decision-making, but simply one stage in the process which leads to and assists in reaching a decision. It has also said that "consultation must be able to have some influence on the decision". [63]

61. During the first discussion in the Conference Committee, the Office representative stated that the term requirement of consultation of the organizations of employers and workers concerned would not require the reopening of the legislative process when the matter was already covered by legislation adopted following appropriate consultation, but that consultation would be required in connection with ratification if a Convention was adopted and ratified. [64]

62. Secondly, the workers excluded from the application of the Convention must be subject, as regards their conditions of employment, to *special arrangements* which *as a whole* provide protection that is *at least equivalent* to that afforded under the Convention, which presupposes the existence of special provisions that match or exceed as a whole the level of protection laid down in the Convention. It is for governments, in the first instance, to determine in good faith whether a particular category of employed persons enjoys different protection which as a whole is at least equivalent to that afforded under the Convention, subject to evaluation by the supervisory bodies of the ILO.

63. In fact, one of the categories of workers frequently excluded from general labour provisions and subject to special arrangements is found to be public employees, [65] and in particular civil servants, whose conditions of employment are often governed by special legislative provisions [66] or collective agreements, [67] or by specific provisions, such as members of the armed forces, the police and magistrates. [68] Among the different categories of public employees, civil servants who are governed by special conditions of service normally enjoy considerable job security; [69] in some countries they are

[63] ILC, 79th Session, 1992, Report III (Part 4B), para. 191.

[64] ILC, 67th Session, Geneva, 1981, *Record of Proceedings*, p. 33/5.

[65] For example: *Burkina Faso*.

[66] For example: *Argentina, Belgium, Chile, Ethiopia, France, Germany, Hungary, Kuwait, Luxembourg, Spain, United States*.

[67] For example: *Denmark, Finland*.

[68] For example: *Ethiopia* (armed forces, police, magistrates), *Niger* (military, magistrates of the judiciary).

[69] For example: *Mexico*.

appointed "for life" [70] after a probation period. Often they cannot be dismissed for incompetence without disciplinary proceedings. [71] In countries where there is no general protection against dismissal for valid reasons, except for protection against dismissal for certain specified reasons, these civil servants may enjoy better protection. [72] Other public employees are often covered by provisions identical to, or comparable with, those applied in other sectors of activity.

64. It should, however, be pointed out that the guarantees under special arrangements applicable to public servants are being eroded in an increasing number of countries due to budgetary constraints and restructuring geared to profitability, [73] which is sometimes reflected in the applicable conditions of service, [74] as also in incentives for voluntary resignation or retirement. [75]

65. Seafarers are also often governed by special rules. [76] However, they are sometimes less well protected than other workers against dismissal. When it is considered necessary to exclude them from the scope of the Convention and

[70] For example: *Belgium; Luxembourg*. Moreover, in the latter country the contracts of non-permanent public employees cannot be terminated once they have reached the age of 35 years and have a total of ten years of service.

[71] For example: *Belgium; Luxembourg*.

[72] For example: *United States*: a federal employee can only be dismissed for reasons linked to the efficiency of the service and specific procedures must be followed. The constitutional and legislative provisions applicable to the public service afford better protection to public employees than to workers in the private sector; the former are also covered by provisions prohibiting dismissal for certain reasons.

[73] See in this respect: ILO: *Report I*, Joint Committee on the Public Service, Fifth Session, 1994, pp. 58-60.

[74] For example: *Niger*: s. 53 of Ordinance No. 89-18 of 8 Dec. 1989 to promulgate the general conditions of service of the public service: in addition to dismissal in the event of loss of nationality or civic rights, physical incapacity, incompetence or refusal to take up the assigned post, persons can also be dismissed for "elimination of the post under the legislative provisions governing redundancies", which provide, inter alia, for notice and compensation to the persons concerned; *Hungary*: s. 30 of Act No. XXXIII of 1992 on the conditions of service of public servants: in addition to reasons related to ability, conduct and age, termination may take place when the activity for which the employee was recruited is discontinued or when it is impossible to maintain employment because of parliamentary, government or ministerial measures affecting the employer.

[75] For example: *Spain*: under Act No. 22/1993 of 29 Dec. 1993, "employment plans" were introduced in the public service, providing, inter alia, for redeployment and mobility as essential tools of human resource policy in the administration. Supplementary measures were introduced, such as the encouragement of voluntary early retirement and phased cessation of activity, bringing more flexibility into the legal framework governing the public service.

[76] For example: *Norway*: in particular, the Seamen's Act No. 18 of 1975, as amended: a seafarer can only be dismissed on the basis of certain factors related to his or her service; termination on the ground of pregnancy is prohibited; seafarers are entitled to the remedies that are generally applicable before the industrial disputes tribunal and may receive compensation in the event of unfair dismissal. The Seamen's Act does not generally allow the conclusion of contracts for a specified period, which would undermine job security.

their conditions of service do not permit their exclusion under Article 2(4) (equivalent protection), their situation should be considered with reference to Article 2(5) (limited categories, special problems), which will be examined below.

Workers in respect of whom special problems arise

66. Under Article 2(5) of the Convention,[77] "in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them".

67. During the drafting of the Convention, it was considered that a certain amount of flexibility was required, in particular to allow member States to exclude certain categories of workers to whom it was particularly difficult to extend certain aspects of the protection afforded by the Convention. The examples mentioned in this context included workers employed in small enterprises or family enterprises, managerial staff, workers who have reached the normal age of retirement, agricultural workers, apprentices, seafarers and domestic workers. Instead of seeking to determine the categories whose coverage presented difficulties for exclusion to be justified, it was considered preferable to include in the Convention a provision allowing, in general terms, the exclusion of *limited categories* of employed persons in respect of which *special problems* of a *substantial nature* might arise.[78] Following an amendment submitted during the second discussion in the Conference Committee, mention was made of the kind of considerations that should be taken into account in determining whether special problems of a substantial nature might arise for different categories of workers. The criteria relate to special conditions of employment and to the size or nature of the enterprise. Of course, the fact that given categories of workers were mentioned during the preparatory work does not mean that these categories are necessarily excluded. The exclusion of a category of workers under Article 2(5) of the Convention must meet the conditions laid down in that paragraph and in paragraph 6 of the same Article.[79] Thus, as in the case of the exclusions referred to in paragraph 4, the organizations of employers and workers concerned must be *consulted* before any measures of exclusion are adopted.

[77] See also Para. 2(4) of the Recommendation.

[78] ILC, 68th Session, 1982, Report V(2), p. 18, and ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/4.

[79] See below, paras. 73-74.

68. Sometimes the general provisions governing termination of employment, whether contained in general labour legislation or specific provisions, do not apply to certain categories of workers who may be subject to special provisions. This is the case, for example, of domestic workers,[80] agricultural workers,[81] family members,[82] construction workers[83] and seafarers.[84] In some countries, persons in executive positions or positions of responsibility or trust are excluded.[85] In *Sweden*, for example, employees who, having regard to their duties and conditions of employment, may be regarded as holding managerial or comparable positions, are excluded from the provisions of the Security of Employment Act.[86] The Government stated that this provision has to be interpreted in a restrictive manner and that it refers to persons who, in practice, exercise the role of an employer and occupy a special position of trust in relation to the employer, even though, formally speaking, they are employees. The Labour Court found in several judgements that a company manager should benefit from a reasonable period of notice; according to the Government, heads of undertakings are well paid and have good conditions of service and it considers that their safeguards are at least equal to the protection afforded by the Convention. In *Malawi*, the application of the provisions of the Employment Act, which covers all economic activities, appears to be limited largely to employed persons in the lower income group. In *Spain*,

[80] For example: *Republic of Korea*: s. 10 of the Labour Standards Act, Law No. 286/1953, as amended; *Portugal*: Legislative Decree No. 235/92: domestic workers are governed by special provisions; *Singapore*: s. 2 of the Employment Act (Ch. 122); *Swaziland*: s. 2 of the Employment Act 1980; *Sweden*: s. 1 of the Security of Employment Act of 24 Feb. 1982; *Venezuela*: s. 275 of the Organic Labour Act; in *France*, on the other hand, in a recent judgement the Court of Cassation ruled that the provisions of the Labour Code relating to dismissal (genuine and serious cause) apply to household staff (*Cass. Soc.*, 13 Jan. 1994).

[81] *Portugal*: according to the Government, following several legislative amendments, the general provisions governing contracts of employment are considered as no longer applicable to agricultural work; a legal position has not yet been reached on this subject; however, a Decree of 1979 provides that the general provisions apply to termination of the employment relationship.

[82] For example: *Republic of Korea*; *Spain*: only members of the immediate family are excluded and only if there is no evidence that they are paid a wage; *Sweden*.

[83] For example: *Venezuela*: s. 75 of the Organic Labour Act, 1990.

[84] For example: *Norway; Portugal*: for merchant ships, seafarers are covered by Legislative Decree No. 74/73; for other ships (fishing vessels), they are covered by collective agreements.

[85] For example: *Australia*: s. 170 CD of the Australian Industrial Relations Act, 1988: in Australia difficulties have been experienced when significant numbers of high-earning employees not covered by awards had their services terminated and they successfully sought and obtained large compensatory awards from industrial tribunals. This trend led to legislation which excluded non-award employees earning in excess of $60,000 per year from being eligible for industrial relief, although common law remedies would still be available, if applicable; *Ethiopia; Singapore*: s. 2 of the Employment Act.

[86] *Sweden*: s. 1 of the Security of Employment Act of 24 Feb. 1982.

the general labour legislation excludes certain workers and provides that certain employment relationships are of a special nature. [87]

69. In several countries, the provisions of labour legislation or those relating to termination do not apply to small enterprises employing fewer than a specified number of workers. [88] The Government of *Germany* stated that the provisions of the Protection against Dismissal Act do not normally apply to enterprises employing fewer than six workers and that this exception is based on a long historical tradition and reasons that are still valid today (in order to guarantee the operation of small enterprises, allow flexibility in responding to demand and take account of the fact that small enterprises are less able to bear administrative and economic costs). [89] In this country there are also special provisions for religious institutions, [90] which have the right to self-management within the limits of the law as it applies to everyone. According to the Government, this affects the rules governing dismissal and workers' representation.

70. Another category of workers mentioned during the preparatory work as being excluded in some countries from provisions affording protection against termination of employment were part-time workers. Protection of these workers against unfair dismissal was discussed at the 80th and 81st Sessions of the International Labour Conference in the context of the adoption of the instruments specifically dealing with this category of workers. The Part-Time Work Convention (No. 175) and Recommendation (No. 182), 1994, contain provisions intended to provide these workers with equivalent conditions to those of full-time workers as regards the termination of their employment relationship:

71. In many countries, the legislative provisions governing termination of employment do not draw a distinction between part-time and full-time

[87] *Spain*: the persons excluded include, in particular, public servants, work performed on a friendly basis and all other work that is performed within a relationship other than that lying within the scope of the legislation. Employment relationships considered to be of a special nature include those of executive staff, domestic workers, professional sportspersons and performers; their employment relationship must conform to the fundamental principles of the Constitution.

[88] For example: *Austria*: the provisions relating to protection against dismissal are incorporated in the Works Constitution Act and therefore only cover the workers who fall within the scope of this Act; *Republic of Korea*: the provisions of the Labour Standards Act may be extended to enterprises continuously employing fewer than four workers; *Sri Lanka*: the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, does not apply to enterprises employing fewer than 15 workers.

[89] See also below: ratification prospects (Ch. VIII).

[90] *Germany*: article 140 of the Constitution, read together with article 137, para. 3, of the Weimar Constitution; decision of the Federal Constitutional Court dated 4 June 1985.

workers,[91] while in others certain thresholds must be met in order for the protection afforded by legislative provisions to apply.[92]

72. In the *United Kingdom*, under the Employment Protection (Consolidation) Act 1978, workers employed between eight and 16 hours a week must work for the same employer for five years in order to acquire protection against unfair dismissal, rights to redundancy pay or appeal against unjustified dismissal. In a recent decision, the House of Lords ruled that the thresholds in respect of hours of work required of these part-time workers, the majority of whom are women, were in breach of European Community law because they amounted to indirect discrimination against women.[93]

Obligation to report

73. A member State which ratifies the Convention has to list in its *first report* submitted after ratification the categories of workers which may have been excluded in pursuance of paragraphs 4 and 5 of Article 2, giving the reasons for the exclusion. It has to state in subsequent reports the position of its law and practice regarding these categories and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

74. Article 2(6) allows governments to take account of future developments towards a reduction of the exclusions referred to in the first report, but it does not allow them subsequently to introduce new exceptions that were not in force at the time of the first report. In addition to affording the appropriate flexibility, the purpose of exception clauses in ILO Conventions is for member States to endeavour to gradually achieve broader application.[94] In this respect, the Committee draws attention to the fact that the provision in Article 2(6) of the Convention does not cover exclusions from paragraph 2 of the same Article, which were discussed above in paragraphs 35 to 56 of this General Survey.

[91] For example: *Belgium, France, Germany, Greece, Luxembourg, Netherlands, Norway, Sweden.*

[92] For example: *Austria; Ireland.* For a detailed examination of national situations, see *Part-time work*, Report V(1), ILC, 80th Session, 1993; see also ILO: "Part-time work", in *Conditions of Work Digest*, Vol. 8, No. 1, 1989.

[93] *United Kingdom*: R v. Secretary of State for Employment, ex parte Equal Opportunities Commission and another [1994] 2 WLR 409; [1994] 1 All ER 910. According to the TUC, women working between eight and 16 hours a week may now seek to establish a claim for unfair dismissal; the situation of those working fewer than eight hours a week remains unclear and that of men appears to call for the adoption of legislation.

[94] Similar provisions are contained in Conventions Nos. 131, 132 and 138. Earlier Conventions generally provided that member States should state any optional exclusions in a declaration appended to their ratification. The wording used in the above Conventions and Convention No. 158 introduced greater flexibility, since the declaration is only required when the first report is submitted.

CHAPTER III

Obligation for termination of employment to be justified by a valid reason

Introduction

75. Article 4 of the Convention provides that "the employment of a worker shall not be terminated unless there is a valid reason for such termination". Article 5 of the Convention[1] lists a number of reasons that do not constitute valid reasons for termination of employment. Article 6 of the Convention[2] refers more specifically to temporary absence from work because of illness or injury as not constituting a valid reason for termination of employment.

76. The need to base termination of employment on a valid reason is the cornerstone of the Convention's provisions. The adoption of this principle removes the possibility for the employer to unilaterally end an employment relationship of indeterminate duration by means of a period of notice or compensation in lieu thereof. It should be noted here that the question of termination of employment for a valid reason is distinct from that of a worker's right to a period of notice and a severance allowance. The Convention requires that there be a valid reason for termination of employment, whether it is terminated following a period of notice or not. In other words, giving the worker a period of notice does not exempt the employer from stating his reasons for terminating the employment. National laws and practices that only require a valid reason for termination of employment where there is no period of notice (this is generally in the case of serious misconduct) and that do not require justification for termination of employment when notice has been given are not in accordance with the Convention.

77. The Committee wishes to emphasize that the obligation to justify termination of employment with a valid reason only applies to the employer in this Convention. A worker's freedom to end an employment relationship of indeterminate duration, subject to an obligation to give notice, is a basic guarantee of the freedom of labour protected by the Forced Labour Convention,

[1] See also Para. 5 of the Recommendation.

[2] See also Para. 6 of the Recommendation.

1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105).[3]

78. Under the Convention, the reasons that may be given are those "connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service". Given the general nature of the terms used, the definition of valid reasons in Article 4 of the Convention falls somewhere between the more concise definitions included in some legislation and the more precise definitions contained in other texts, which list the various valid reasons for termination. It is largely consistent with the definition used in a number of countries where the concepts of the capacity and conduct of the worker and the operational requirements of the undertaking, establishment or service are in keeping with most of the specific reasons considered as valid for the termination of employment in certain legislation.

79. During the preparatory work, the Office indicated that for reasons connected with the capacity or conduct of the worker to be considered as valid, they must have a bearing on the work of the worker or the working environment.[4] It was also specified that Article 1 of the Convention on methods of implementation applies to the whole of the instrument[5] and that it therefore also applies to Article 4. In other words, the definition or interpretation of valid reasons is left to the methods of implementation referred to in Article 1, subject of course to the requirement that it must be in conformity with Article 4.

The need for a valid reason

80. Often under the impetus of the adoption by the Conference of the Termination of Employment Recommendation, 1963 (No. 119), since the 1960s numerous countries all over the world have adopted legislation protecting workers against termination of employment without valid reason. Today a large number of countries provide protection for workers against unjustified termination of employment.

[3] See *Abolition of forced labour*; General Survey of the reports relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105), Report III (Part 4B) (paras. 67-73), ILC, 65th Session, 1979.

[4] ILC, 67th Session, 1981, Report VIII(2), p. 33.

[5] ILC, 68th Session, 1982, Report V(2), p. 20.

81. The legislation of some countries details reasons that are considered to be justified for termination of employment. [6] The reasons given are usually connected with the conduct or capacity of the worker, or with the operational requirements of the undertaking. [7] In other countries, legislation uses the same or similar terms to those of the Convention. [8] In yet other countries, legislation is less specific, requiring, for example, a "valid reason" or "real and serious grounds". [9] It is primarily the bodies responsible for applying these provisions which have accumulated a body of case-law in this field which is sometimes extensive. [10] This is also the case in countries where measures of redress are provided for terminations of employment without legitimate reason that are considered to be wrongful *(abusifs)*. [11]

[6] *Belarus*: s. 33 of the Labour Code, as amended on 15 Dec. 1992; *Bulgaria*: ss. 325, 328 and 330 of the Labour Code, as amended in 1992; *Croatia*: s. 57 of the Law on basic employment rights; *Czech Republic*: ss. 46 to 53 of the 1965 Labour Code as amended, inter alia, in Mar. 1994; *Latvia*: Labour Code; *Mexico*: ss. 46 and 47 of the Federal Labour Act; *Panama*: s. 213 of the Labour Code; *Portugal*: ss. 3 and 9 of Legislative Decree No. 64-A/89; *Russian Federation*: ss. 33 and 254 of the Labour Code; *Spain*: ss. 51 to 53 of the Workers' Charter; *Swaziland*: s. 36 of the Employment Act, 1980.

[7] *Spain*, ss. 52 and 54 of the Workers' Charter: there is a legal distinction between objective reasons for the termination of employment, which include reasons in connection with the operational requirements of the undertaking and some reasons linked with the worker himself and disciplinary reasons in connection with serious and wilful shortcomings in the performance of the worker.

[8] *Australia*: s. 170DE of the Industrial Relations Act, 1988, as amended by the Industrial Relations Reform Act, 1993; *Ethiopia*: s. 26 of Labour Proclamation No. 42/1993; *Germany*: s. 1 of the Protection against Dismissal Act: termination of employment is not justified unless it is based on reasons connected to the worker himself, his conduct or the urgent requirements of the undertaking. The burden of proof is on the employer; *Hungary*: s. 89(3) of Act No. 22 of 1992 to promulgate the Labour Code; *Lebanon*: s. 50(4) of the Labour Code of 1946, as amended on 31 Dec. 1993: termination is wrongful, inter alia, if it is for an invalid reason or one which is not connected with the worker's capacity, his conduct within the establishment or the proper management or operation of the establishment; *Luxembourg*: s. 22 of the Act on contracts of employment of 24 May 1989: reasons connected with the worker's capacity or conduct or based on the operational requirements of the undertaking, establishment or service must be real and serious; *Peru*: ss. 59, 60 and 90 of the Employment Promotion Act of 1993; *Zaire*: s. 48 of the Labour Code.

[9] For example: *Gabon*: s. 41 of the Labour Code: the employer must indicate in writing the real and serious grounds; in the event of a dispute, the employer must provide proof of the real and serious nature of the grounds; *Tunisia*: under s. 14*ter* of the Labour Code (added by Act No. 29 of 21 Feb. 1993), termination of employment is considered as wrongful if it occurs without real and serious grounds to justify it or if the procedures laid down in legislation, regulations or collective agreements have not been complied with.

[10] *France*: s. L.122-14-3 of the Labour Code: in the event of a dispute, the judge determines the real and serious nature of the reasons.

[11] For example: *Mali*: s. 51 of the Labour Code of 1992: rescission of the contract is wrongful, inter alia, when the termination of employment occurs without legitimate reason or if the reason given is incorrect; *Niger*: s. 41 of the Labour Code of 1962: terminations of employment without legitimate reason are wrongful; *Senegal*: s. 51 of the Labour Code.

82. Sometimes the powers conferred on the competent authorities to permit certain forms of termination of employment can only be exercised if criteria are invoked to justify them. [12] If legislation does not explicitly lay down the criteria whereby the administrative authorities may grant or refuse authorization, thus leaving them a fairly wide margin of judgement, it appears that in practice authorization is only granted if the employer can justify termination. The justification should be based on a reason connected with the conduct or capacity of the worker or operational requirements.

83. In some countries, the legislation requires a valid reason for termination of employment, but only in the case of termination of employment without notice and not in the case of termination of employment with notice. [13] In others, the concept of the abusive exercise of a legal right laid down in civil law may offer a certain amount of protection. [14] This concept has been systematically applied in *Japan*, where civil courts have established that, in the case of termination of employment with notice, the employer must cite a pressing reason, often termed just or reasonable cause, for termination of the employment relationship. This means that where the termination of employment is not objectively reasonable or socially acceptable, it is deemed to be an abuse of the right to terminate employment, and is therefore null and void. It should be noted that when a firm system of rules limiting the discretionary exercise of the right of dismissal is developed through case-law on the basis of the concept of the abusive exercise of a legal right, this system should cover all the valid reasons for termination of employment encompassed by Article 4 of the Convention; otherwise, a system of protection based only on the concept of the abusive exercise of a legal right would be unlikely to give full effect to the

[12] *Netherlands*: s. 6 of the Extraordinary Decree on labour relations: administrative authorization is required for all terminations of employment apart from those where no notice is given; *Suriname*: Dismissal Licence Decree No. E-39 of 1983: the employer may not terminate the employment relationship without express authorization; the request and the authorization must indicate the reasons for ending the contract. If no decision has been returned within 30 days, authorization is considered to be granted. Termination of employment without authorization is null and void and the employer is liable to legal sanctions. Authorization is not required if the termination is based on s. 1615p of the Civil Code.

[13] For example: *Qatar*: s. 18 of the Labour Code of 1962, as amended; *Singapore*: ss. 10 and 14 of the Employment Act (Ch. 122); *Thailand*: ss. 582 and 583 of the Civil and Commercial Code; *Turkey*: s. 13 of the Labour Act, No. 1475. The organization TURK-IS drew attention to the fact that objective criteria with regard to termination of employment have not been included in the currently applicable provisions, with the exception of those that apply to trade union representatives.

In some *Latin American* countries, a distinction is made between termination for misconduct (*terminación del contrato*) (equivalent to serious misconduct; without notice or compensation) and rescission of the contract (*desahucio*) (with notice and, where appropriate, with compensation) for which no reason is required.

[14] For example: *Japan*: s. 1(3) of the Civil Code; *Switzerland*: s. 2(2) of the Civil Code (the manifest abuse of a right is not protected by the law); *Uruguay*.

principle set out in Article 4.[15] In a number of these countries, specific provisions or case-law protects workers against termination of employment for particular reasons.[16] The Government of *Greece* has stated that, whilst most workers are not protected by specific provisions and may have their employment terminated without reason, the case-law applied by the courts, based on section 281 of the Civil Code, has declared wrongful (resulting in their invalidity) terminations of employment for reasons such as the filing of a complaint for alleged violation of laws or regulations, political opinion, dismissal during the period preceding call-up for military service, age or family responsibilities.

84. In one country, different provisions are applied to wage-earners and salaried employees. With regard to wage-earners, the law considers termination of employment to be abusive when it is carried out for reasons not linked to any of the valid reasons provided for in the Convention. In the case of salaried employees, reference is made to the general concept of the abusive exercise of a legal right.[17]

85. In the *United States*, the doctrine whereby the employment relationship is considered to be at the will of the parties has been eroded by exceptions established by Congress, state legislatures and the courts, to the point where, according to the Government, it only applies to a small number of terminations of employment. If the termination of employment comes under one of the recognized exceptions, the employer is no longer free to terminate the employment relationship at will and may be liable to be sued for wrongful dismissal. Approximately 20,000 cases are currently under examination by the courts. Since the 1970s, state courts have increasingly restricted the right of employers to terminate employment at will through the application of common law principles. In wrongful dismissal cases they have created exceptions, based

[15] In *Belgium*, the concept of "the abusive exercise of a legal right" is sometimes seen as intent to harm, and it cannot therefore be invoked when there is no such intent.

[16] For example: *Republic of Korea, Thailand, Switzerland.*

[17] *Belgium*: Wage-earners (*ouvriers*): s. 63 of the Act of 3 July 1978 respecting employment contracts: termination of employment for reasons that are not related to the capacity or conduct of the worker or that are not based on the operational requirements of the undertaking, establishment or service is considered to be abusive. In the event of a contested termination of employment, the burden is on the employer to prove that the termination is not abusive. Salaried employees (*employés*): in accordance with the concept of the abusive exercise of a legal right, a right (to terminate employment) must be exercised for the purpose for which it was granted: i.e. the interests of the undertaking. In this case, it is for the worker to prove that the termination of employment was abusive. The justification of termination of employment therefore only applies in the framework of certain specific forms of protection and remedies for abusive termination of employment are applicable only to wage-earners and not to salaried employees, who currently constitute the largest category of workers.

on public policy, implied contract, good faith and fair dealing, and tort.[18] Furthermore, in this country collective agreements often contain clauses that provide that employees will not be discharged except for "just cause" and establish grievance and arbitration procedures. Over the years, arbitrators have also drawn up a set of relatively coherent rules regarding termination of employment.

Reasons for termination of employment

86. Under Article 4 of the Convention, valid reasons for the termination of employment must be connected with the capacity or conduct of the worker, or be based on the operational requirements of the undertaking, establishment or service.

87. Before looking at the various reasons outlined in the Convention and their application, it should be mentioned here that, depending on the reason invoked, the applicable provisions of legislation or collective agreements, both substantive and procedural, may differ. For example, incompetence or unsatisfactory performance, which may be caused by a lack of skills or natural ability, constitutes a reason for termination connected with the capacity of the worker; on the other hand, if the employer invokes professional misconduct, such as the worker's bad faith or negligence in his work, the classification of the termination of employment will usually change. Instead of termination of employment on the grounds of the capacity of the worker, it will be based on the conduct of the worker and may lead to disciplinary action.

88. The more general the terms used in the applicable provisions, the more the definition of valid reasons for termination of employment depends on how these provisions are interpreted by the bodies that apply them (courts, industrial tribunals, arbitrators or other bodies). To understand the extent to which the reasons considered in practice as justifying termination of employment

[18] Under the public policy exception, an employer who dismisses a worker for a reason that is contrary to established public policy may be sued for wrongful dismissal. This exception is invoked when workers are discharged for exercising a legal right (such as filing a workers' compensation claim), satisfying a legal obligation (such as jury duty), or refusing to commit an illegal act on behalf of an employer.

Under the implicit contract theory, the employer himself creates exceptions by promising employees — either intentionally or not — by way of documents or statements, that they will only be terminated for "just cause" (e.g. in statements during employment interviews, performance evaluations, the employer's policy manual or employee handbook). However, the courts have accepted termination of employment where a disclaimer in these manuals expressly outlines the at will nature of the employment relationship.

In a more limited number of cases, the courts have based their decision on an implied covenant of good faith and fair dealing. In other cases, courts have allowed cases based on the common law "tort" theories. (These theories are utilized both alone or in addition to other wrongful termination theories. They include fraudulent misrepresentation, defamation, invasion of privacy.)

correspond to the valid reasons covered by the Convention, it is therefore important for countries which ratify the Convention to communicate the decisions which form the basis of case-law or to provide relevant information on how the provisions are applied in practice.

Reasons connected with the conduct of the worker

89. Article 4 of the Convention refers expressly to termination of employment "connected with the conduct of the worker". Traditionally, a worker's improper behaviour is treated as misconduct and can result in termination of employment if it is considered to be sufficiently serious. Reasons for termination of employment connected with the conduct of the worker can be constituted either by professional misconduct, which may lead to disciplinary action and termination of employment, or improper behaviour.

90. The types of conduct for which a worker may be dismissed are frequently referred to in legislation in general terms such as "misconduct" or "breach of discipline", but more precise definitions can also be found. Misconduct, when defined, can belong to one of two categories: the first usually involves inadequate performance of the duties the worker was contracted to carry out; the second encompasses various types of improper behaviour. The first category may include such forms of misconduct as neglect of duty, violation of work rules (particular mention is sometimes made of rules related to safety and health), disobedience of legitimate orders and absence or lateness without good cause. The second category includes in particular disorderly conduct, violence, assault, using insulting language, disrupting the peace and order of the workplace, turning up for work in a state of intoxication or under the influence of narcotic drugs, or the consumption of alcohol or drugs at the workplace, various acts displaying a lack of honesty and trustworthiness, such as fraud, deceit, breach of trust, theft and various disloyal activities (such as divulging trade secrets or undertaking activities in competition with the employer) or causing material damage to the property of the undertaking. Certain forms of misconduct, such as absence or lateness without good cause or turning up for work in a state of intoxication, often have to be habitual or repeated if they are to warrant dismissal.

91. In several countries, legal provisions differentiate between various degrees of misconduct; one of these is serious misconduct, which gives rise to summary dismissal (in some countries subject to the condition that the misconduct must be such as to make it impossible to permit even temporary continuation of the employment relationship), and the other is misconduct of a less serious nature, which may lead to termination of employment with notice. In some countries, legislation only envisages one category of misconduct, namely misconduct that justifies termination of employment without notice. [19]

[19] See Ch. V below.

92. In some cases, behaviour outside the workplace can affect the continuation of the contract of employment, in particular with respect to behaviour that has resulted in the imprisonment of the worker. [20] In the case of a worker serving a sentence of imprisonment, the Committee is of the opinion, as it stated in its General Survey of 1974 on Recommendation No. 119, that unless the interruption of the employment is likely to be so long as to rule out the maintenance of the employment relationship, it would be desirable to seek, where possible, merely to suspend the relationship and retain the worker's job for him with a view to helping him to return to normal life after his sentence is served. [21]

93. Given that termination of employment is the most serious disciplinary measure that a worker can suffer for reasons related to his conduct, in cases where legislation grants the employers a certain amount of leeway, it is important that, taking into account the nature of the misconduct, the employers do not fail to consider all other possible forms of disciplinary action before applying this measure of last resort.

Reasons connected with the capacity of the worker

94. A lack of capacity, or aptitude, on the part of a worker can take two forms. It can result from a lack of the skills or qualities necessary to perform certain tasks, leading to unsatisfactory performance. Lack of capacity is therefore distinct from bad conduct, for which it is necessary to demonstrate a certain degree of "guilt" on the part of the worker. Poor work performance not caused by intentional misconduct, as well as various degrees of incapacity to perform work as a result of illness or injury, are also covered by the concept of the capacity of the worker.

95. As in the case of misconduct, [22] the worker can be offered some safeguards with regard to termination of employment for reasons connected with capacity, such as careful assessment of his work, warning him about the possible consequences if the quality of his work does not improve, and allowing him to

[20] For example: *Mexico*: s. 47 of the Federal Labour Act: the employer can terminate the contract of employment if, due to imprisonment resulting from a sentence having force of *res judicata*, the worker cannot fulfil his obligations with respect to the employment relationship.

[21] ILC, 59th Session, 1974, Report III (Part 4B), para. 35, note 5.

[22] For example: *Mexico*: s. 53 of the Federal Labour Act: the worker's physical or mental incapacity or his obvious lack of skills, which prevent him from performing the work, constitute reasons for termination of the employment relationship; *Peru*: s. 59 of the Employment Promotion Act of 1993: valid reasons for termination of employment in connection with the capacity of the worker are: the loss of the necessary physical or mental faculties or an acquired incapacity to perform his duties; insufficient output, taking into account the worker's abilities and the average output for similar work in similar conditions; the unjustified refusal of the worker to undergo a medical examination that has been agreed in advance or is required by law as a condition for the employment relationship, or to comply with the preventive or curative measures prescribed by the doctor in order to avoid illnesses or accidents.

demonstrate his skills and to improve his work performance. With respect to absence from or incapacity to work due to illness or injury, protective measures are often adopted and are more extensive if the injury or illness is of an occupational nature. Article 6 of the Convention mentions the case of absence from work because of illness or injury as not constituting a valid reason for termination of employment. This question is examined below. [23]

Reasons based on the operational requirements of the undertaking, establishment or service

96. The concept of the "operational requirements" of the undertaking is not defined in the Convention or the Recommendation. The report presented by the Office for the first discussion at the Conference stated that these reasons "generally include reasons of an economic, technological, structural or similar nature. Dismissals resulting from these reasons may be individual or collective and may involve reduction of the workforce or closure of the undertaking". [24] In its General Survey of 1974 on Recommendation No. 119, the Committee pointed out that reasons relating to the operational requirements of the undertaking were generally defined by reference to redundancy or reduction of the number of posts for economic or technical reasons, or due to *force majeure* or accident. [25]

97. In one country, the following reasons are given as examples: rationalization or modernization of undertakings, establishments or services, a fall in production, changed market or economic conditions requiring the dismissal of one or more workers and failure of the worker to adapt to the work or technique. [26] In *France*, it has been ruled that a termination of employment is not for an economic reason if it is the result of a reorganization that has not been carried out in the interests of the undertaking. [27]

98. Reasons related to the operational requirements of the undertaking, establishment or service could also be defined in negative terms as those necessitated by economic, technological, structural or similar requirements which are not connected with the capacity or conduct of the worker. Sometimes specific conditions and procedures apply to termination of employment for these reasons, such as the employer's obligation to prove that the termination of the contract of employment is dictated by operational requirements when he invokes this reason, or a restriction on the number of workers whose employment can

[23] See paras. 136-142 below.

[24] ILC, 67th Session, 1981, Report VIII(1), p. 23.

[25] ILC, 59th Session, 1974, Report III (Part 4B), para. 34. The instruments contain supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons which will be examined below in Chapter VII.

[26] *Chile*: s. 161 of the Labour Code of 1994.

[27] *Cass. Soc.*, 23 Mar. 1994.

be terminated for this reason within a year, [28] or the obligation to take social factors into account. [29]

Prohibition of termination of employment for certain reasons

99. While Article 4 sets forth the principle that the employment of a worker should not be terminated unless there is a valid reason, Article 5 provides that certain reasons do not constitute valid reasons for termination. [30] Article 6 of the Convention refers more specifically to temporary absence because of illness or injury, which is considered to be an invalid reason.

Invalid reasons for termination of employment in the Convention

100. Under Article 5 of the Convention, "the following, inter alia, shall not constitute valid reasons for termination: *(a)* union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours; *(b)* seeking office as, or acting or having acted in the capacity of, a workers' representative; *(c)* the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities; *(d)* race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; *(e)* absence from work during maternity leave".

101. Article 5 lists a minimum number of grounds that do not constitute valid reasons for termination of employment. However, the list is not exhaustive, as the term "inter alia" indicates, and the State clearly has the possibility, although by no means the obligation, to provide that other reasons are not valid, as for example, those laid down in Paragraph 5 of the Recommendation. In fact, many States provide a special protection for other

[28] For example: *Peru*: s. 90 of the Employment Promotion Act of 1993.

[29] For example: *Germany*: termination of employment based on the urgent needs of the undertaking is socially unjustified, and might be challenged in the courts, if the employer has not taken social factors into account or has not done so sufficiently. Neither is termination socially justified if the works council is opposed to it, either because the termination contravenes directives with regard to termination of employment drawn up by the council and the employer, or because the worker could continue to be employed in another job.

[30] Paragraph 5 of the Recommendation contains the invalid reasons listed in the Convention, with the addition of age and the absence from work due to compulsory military service or other civic obligations.

reasons, such as participation in strikes, non-membership of a trade union, refusal to undergo a lie-detector test, state of health, physical disability, etc. [31]

102. Protection against some of the invalid reasons for termination of employment included in Article 5 of the Convention reflect the protection laid down in a number of other ILO instruments, in particular the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958; the Workers' Representatives Convention (No. 135) and Recommendation (No. 143), 1971; the Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981; the Maternity Protection Convention, 1919 (No. 3), the Maternity Protection Convention (Revised), 1952 (No. 103), and the Maternity Protection Recommendation, 1952 (No. 95). The Committee has considered the protection provided by these instruments and their application in its recent general surveys on freedom of association, workers with family responsibilities and equality in employment and occupation. [32]

103. As indicated in the aforementioned General Surveys, a considerable number of countries protect workers against termination of employment for one or more of the reasons set forth in Article 5 of the Convention, generally by means of legislation. [33] This is the case both in countries that require termination of employment to be justified and in those where there is no requirement for justification. These forms of protection are usually included in more far-reaching policies intended to guarantee, for example, trade union rights, a comprehensive system of workers' representation within the enterprise, the right to claim protection under legislation governing work and employment, and equality of treatment. Some of these guarantees were instituted even before protection against unjustified termination of employment was incorporated into the legislation.

[31] For example: *Australia, Canada, Chile, Finland, France, Germany, Panama, Philippines, Portugal, United States*.

[32] *Freedom of association and collective bargaining*, General Survey of the reports on the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), and the Right to Organize and Collective Bargaining Convention, 1949 (No. 98); ILC, 81st Session, 1994, Report III (Part 4B). *Workers with family responsibilities*, General Survey of the reports on the Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981; ILC, 80th Session, 1993, Report III (Part 4B). *Equality in employment and occupation*, General Survey of the reports on the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958; ILC, 75th Session, 1988, Report III (Part 4B). See also: *Equal remuneration*, General Survey of the reports on the Equal Remuneration Convention (No. 100) and Recommendation (No. 90), 1951; ILC, 72nd Session, 1986, Report III (Part 4B); and *Maternity protection*, taken from the Report of the 35th Session (1965) of the Committee of Experts on the Application of Conventions and Recommendations, 1965.

[33] For example: *Australia*: s. 170DF of the Industrial Relations Act, 1988, as amended by the Industrial Relations Reform Act, 1993.

104. Explicit guarantees are nevertheless also useful in countries where there is a more general system of protection, particularly where legislation provides a general definition of the obligation to justify termination of employment. In countries that have not instituted a general system of protection against termination of employment without valid reason or in those in which this system only provides partial protection, specific forms of protection against termination of employment for one of the reasons enumerated in Article 5 of the Convention take on particular importance. [34]

(a) Union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours

105. This provision is based, among other sources, on Article 1 of the Right to Organize and Collective Bargaining Convention, 1949 (No. 98), one of the aims of which is to protect the worker against termination of employment for reasons connected with union membership or activities.

106. Trade union membership and participation in trade union activities constitute one of the most common invalid reasons for termination of employment.

107. As has already been pointed out by the Committee, the protection afforded to workers and trade union officials against acts of anti-union discrimination constitutes an essential aspect of freedom of association, as acts of this nature may result in practice in a denial of the guarantees laid down in the Freedom of Association and Protection of the Right to Organize Convention, No. 87. [35]

108. In a number of countries, workers are protected against acts of anti-union discrimination under general labour legislation or specific legal provisions. [36] Other legislation provides no general protection in this area [37]

[34] As in the case of other specific reasons for which provision is made in some countries, such as those included in Recommendation No. 166.

[35] *Freedom of association and collective bargaining*, General Survey, Ch. VIII.

[36] For example: *Canada, Côte d'Ivoire, France, Ireland, Panama, United States.* In the *Dominican Republic,* the Labour Code now applies to workers who did not previously benefit from this protection, in particular those in agricultural, agro-industrial, livestock or forestry undertakings. In the *United Kingdom,* the Trade Union Reform and Employment Rights Act of 1 July 1993 removed the two years' qualifying period which had previously to be served before an employee could complain of unfair selection for redundancy on grounds of union membership or activities. According to the TUC, s. 153 of the 1992 Act had already repeated existing provisions, dating from 1978, to the effect that selection for redundancy on the grounds of union membership was an inadmissible reason and that the qualifying period for protection did not therefore apply.

[37] For example: *Iraq, Sri Lanka.*

or denies it directly or indirectly to certain categories of workers.[38] Legislation sometimes guarantees protection against acts of anti-union discrimination, including termination of the employment relationship.[39] Some legislation grants special protection to certain persons, such as the members of a trade union that has applied for registration or that is in the process of being established,[40] the founders of a trade union,[41] or trade union leaders and officers.[42]

109. In several countries legislation expressly stipulates that termination of employment due to participation in a strike is unlawful[43] or null and void.[44] In contrast, in one country, workers who participate in industrial action run the risk of having their employment terminated and do not have the right to make a complaint for unfair dismissal to an industrial tribunal.[45]

110. Protection against acts of anti-union discrimination, and in particular termination of employment for such activities, is particularly necessary for trade union leaders and representatives, since in order to be able to fulfil their duties freely and independently they must have the guarantee that they will not suffer any prejudice as a result of holding trade union office or taking up trade union activities. One way of ensuring the protection of trade union representatives is to stipulate that their employment may not be terminated either during their term

[38] For example: *Jordan*: agricultural and domestic workers; *Libyan Arab Jamahiriya*: agricultural workers and seafarers; *Nigeria*: people carrying out managerial, technical or administrative tasks, commercial travellers and other commercial agents, homeworkers, persons working on ships and aeroplanes.

[39] For example: *Belgium, Benin, Botswana, Dominica, Equatorial Guinea, Ethiopia, Germany, Madagascar, Mauritania, Panama, Romania.*

[40] For example: *Ecuador*: the Committee noted with interest that Act No. 133 to reform the Labour Code provides that employers may not dismiss any of their workers from the time that they notify the respective labour inspector that they have met in a general assembly to set up a workers' association until the first meeting of the executive committee (ILC, 79th Session, 1992, Report III (Part 4A), p. 267).

[41] For example: *Honduras*: s. 517 of the Labour Code.

[42] For example: *Finland, Hungary, Romania, Spain, Turkey*.

[43] For example: *Finland, Panama.*

[44] *France*: s. L.122-45, paras. (2) and (3) of the Labour Code: the dismissal of a worker due to the normal exercise of his right to strike is legally invalid; *India*: s. 33 of the Industrial Disputes Act: a workman cannot be discharged nor his conditions of service be changed during the pendency of conciliation, arbitration or adjudication proceedings.

[45] *United Kingdom*: ss. 237 and 238 of the Trade Union and Labour Relations (Consolidation) Act of 16 July 1992. See also Lewis and Britton v. E. Mason & Sons [1994] IRLR 4 (EAT). According to the Government, workers participating in a strike may not have the right to appeal against dismissal. They will never have such right if dismissed while taking part in unofficial industrial action.

The TUC has stated that the risks of dismissal as a result of participating in industrial action have risen since the adoption of the Employment Act 1990 which, like the Trade Union Reform and Employment Rights Act, broadened the definition of unofficial industrial action, the 1990 Act having removed the right to bring a complaint for unfair dismissal to an industrial tribunal for anyone taking part in unofficial industrial action.

of office or for a certain period of time following its expiry. Whilst some exceptions may be laid down for cases of serious misconduct, the nature and the importance of the duties performed by a trade union representative and the demands of this kind of office should be taken into account when deciding whether an offence has really been committed and when determining how serious it is. [46]

111. It should be noted that, during the preparatory work, an amendment aiming to extend the protection accorded by the Convention to workers not wishing to join a trade union or participate in its activities was rejected. [47] In some countries, legislation guarantees either directly or indirectly the right not to join a trade union and forbids the exercise of any constraint which would oblige anyone to join or support a trade union. [48]

(b) Seeking office as, or acting or having acted in the capacity of, a workers' representative

112. Protection against termination of employment as a result of trade union membership or participation in trade union activities, provided for in Article 5(a) of the Convention and in national legislation, generally covers trade union officials who are acting as workers' representatives for a number of reasons. Workers' representatives are specifically mentioned in Article 5(b) of the Convention in order to ensure similar protection to people who are acting as workers' representatives outside the trade union context. This provision adopts the logic of the Workers' Representatives Convention, 1971 (No. 135), Article 1 of which provides that workers' representatives in the undertaking shall enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities. [49] Under Article 5(b) of Convention No. 158, a workers' representative shall not be dismissed for reasons connected with his office, not only during his term of office, but also before, when he is seeking it and after performing his duties as a representative.

[46] See *Freedom of association and collective bargaining*, General Survey, paras. 206-210.

[47] ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/5.

[48] For example: *Chile*: art. 19 of the Constitution; *Denmark*: Act No. 443 of 1990; *Equatorial Guinea*: Act No. 12/1992; *Portugal*: art. 56(2)(b) of the Constitution, s. 37 of the Trade Unions Act and s. 1(3) of Act No. 57 of 1977; see also *Freedom of association and collective bargaining*, General Survey, paras. 100-103 and 205.

[49] For the purposes of Convention No. 135, the term "workers' representatives" means persons who are recognized as such under national law or practice, whether they are —

(a) trade union representatives, namely, representatives designated or elected by trade unions or by members of such unions; or

(b) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognized as the exclusive prerogative of trade unions in the country concerned.

Depending on the country, workers' representatives may include various categories of persons, including trade union delegates, staff delegates and members of works councils and of safety and health committees. [50]

113. A significant number of countries provide protection for workers' representatives and often supplement the basic provisions against termination in general with a number of specific procedures to be followed when termination of a worker's representative's employment is contemplated. [51] In many cases, prior notification or authorization is required and is often granted by an administrative authority, such as the labour inspectorate or a works council. [52] Sometimes a limitative list of the reasons for termination is established. [53]

114. In *Belgium*, for example, it is prohibited to dismiss a workers' representative for any reason other than serious misconduct or economic or technical reasons. In that country, as in others, unlawful termination of the employment of workers' representatives is invalid. [54] A growing number of

[50] For example: in *Brazil* the term includes the worker elected as a representative in accident prevention committees. This protection extends also to substitutes; in *France* the term includes the following categories of workers: staff delegates, members of works councils and health, safety and working conditions committees, trade union delegates, trade union representatives on works councils, workers' representatives on the boards of governors or supervisory boards of enterprises subject to the legislation on the democratization of the public sector. Other categories of workers are protected irrespective of whether or not they hold an elective office: representatives of workers in enterprises undergoing judicial procedures designed to prevent bankruptcy, members of industrial tribunals and, since 1991, workers' advisers.

[51] For example: *Costa Rica, France, Greece, Iraq, Kenya, Russian Federation, Slovenia. Portugal*: ss. 10, 12, 14 and 23 of Act No. 64-A 89: the legislation specifies the details of the disciplinary procedure concerning workers' representatives, renders urgent any legal procedure to overturn their termination, establishes a general presumption of lack of a valid reason, and grants them a preference to retain their posts in the case of collective dismissal.

[52] For example: *Côte d'Ivoire, Hungary, Niger, Senegal. France*: case-law considers that the provisions whereby the termination of employment of workers who act as workers' representatives must be subject to the prior notification of the works council or the authorization of the labour inspector, are binding (*Cass. Soc.*, 21 Feb. 1989). A staff representative, even if he lacks the capacity for the work, may not have his employment terminated without the authorization of the labour inspector (*Cass. Soc.*, 4 May 1994). *Tunisia*: s. 166 (new) of the Labour Code: notification of the labour inspector is required.

[53] For example: *Belgium, Brazil, Greece.*

[54] The Committee noted with satisfaction in 1994 that in *Costa Rica* Act No. 7360 of 4 Nov. 1993 lays down guarantees against acts of discrimination, including dismissals, against workers' representatives because of their trade union activities, and that it provides for reinstatement, the quashing of the prejudicial measures and a fine (ILC, 81st Session, 1994, Report III (Part 4A), Convention No. 135, *Costa Rica*).

countries are adopting legal provisions to protect workers' representatives responsible for occupational safety and health issues. [55]

(c) The filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities

115. This invalid reason for termination of employment is an important aspect of employment security as it provides protection for workers against retaliatory measures. [56] In its General Surveys on equal remuneration and on equality in employment and occupation, the Committee emphasized this point with respect to rights in the fields of equal remuneration and equality of opportunity and treatment. [57]

116. Protection of this kind can be established through provisions to protect workers against retaliatory measures when they try to defend their rights under the Constitution, the Labour Code or other legislative provisions. [58] Thus, in a growing number of countries there are legal provisions to protect a worker against retaliatory measures should he denounce, for example, working conditions that fail to meet standards set by law, discriminatory practices in

[55] For example: *Austria; France*: s. L.236-11 of the Labour Code: provisions with respect to protection against termination of employment of the members of works councils apply to staff representatives in committees on health, safety and working conditions; *United Kingdom*; *Hungary*: s. 76 of Act No. XCIII of 1993 on occupational safety: in order to protect the rights of occupational safety delegates, the rules that apply to elected union representatives also apply to them.

[56] During the preparatory work, an amendment for the deletion of the expression "in good faith" in the proposed Convention was adopted. The author of the amendment considered that protection against termination of employment for having filed a complaint or participated in proceedings against an employer should not depend on the subjective question of whether the worker was acting in good faith.

[57] *General Survey* of 1986, para. 169; *General Survey* of 1988, para. 115.

[58] For example: *Botswana*: s. 23 of the Employment (Amendment) Act of 1992; *Canada*: under s. 94(3) of the Canada Labour Code, it is prohibited for any employer to refuse to continue to employ any person because he has made an application or filed a complaint under Part I of the Code (Industrial Relations). Similar provisions apply, for example, in the Province of Ontario (s. 76 of the Employment Standards Act); *Dominica*: s. 10 of the Employment Protection Act of 1977; *Japan*: Labour Standards Law; *Mauritius*: s. 32 of the Labour Act, No. 50 of 1975; *Panama*: s. 139 of the Labour Code; *San Marino*: ss. 4, 6 and 7 of Act No. 23/1977; *United Arab Emirates*: s. 122 of the Labour Code; *United States*: several laws protect various categories of workers against retaliatory measures, such as the National Labor Relations Act (29 USC, ss. 158(a)(4), 7116(a)(4)); the Fair Labor Standards Act (29 USC, ss. 202, 215(a)(3) and 216(b)); the Longshore and Harbor Workers Compensation Act (33 USC, s. 948(a)); *United Kingdom (Montserrat)*: s. 12 of the Employment Ordinance of 1979.

employment[59] or non-compliance with occupational safety and health provisions.[60] Sometimes protection is of more limited scope and is restricted to the rights resulting from the contract of employment.[61]

117. In the General Survey on equality in employment and occupation, the Committee emphasized more specifically that the effective protection of the principle of equality presupposes the existence of guarantees providing protection against retaliatory measures for a person who lodges a complaint with the appropriate body, who institutes proceedings to enforce his or her rights, or who is a party to such proceedings as a witness. Such measures, the most brutal form of which is termination of employment, taken against a person who has suffered discrimination and who has availed himself of a right which is his in accordance with the national policy of equal opportunity and treatment, are of a particularly serious nature and can have detrimental effects with regard to the practical application of anti-discriminatory provisions, as those who have suffered discrimination often hesitate to have recourse to procedures to redress their grievances for fear of reprisals.[62] The Committee also emphasizes the seriousness of retaliatory measures, in particular in the form of termination of employment, taken against a worker who reports the employer's failure to apply occupational safety and health rules whilst the workers' physical integrity, health, and even lives may be at risk. When fundamental rights or the physical integrity or lives of workers are at stake, it would be desirable for conditions as to proof (reversal of the burden of proof) and measures of redress (reinstatement) to be such as to allow the worker to report illegal practices without fearing reprisals, although that is not an explicit requirement of Convention No. 158.

[59] For example: *Australia*: s. 94 of the Sex Discrimination Act, 1984; *Ghana*: s. 70 of the Labour Regulations, 1969; *Jamaica*: s. 6 of the Employment (Equal Pay for Men and Women) Act, 1975.

[60] For example: *Canada*: Province of Ontario: under s. 50 of the Occupational Health and Safety Act, a worker may not be dismissed for having acted in compliance with this Act, for having sought the enforcement of the Act or for having acted as a witness in a proceeding concerning the enforcement of the Act; *Hungary*: under s. 62 of Act No. XCIII of 5 Oct. 1993 on occupational safety, a worker shall not suffer discrimination as a result of requests made to ensure respect for requirements regarding health and safety at work or because he has pointed out in good faith a clear instance of negligence by the employer; *United States*: Occupational Safety and Health Act (29 USC, s. 660(c)(1) and (2)); Federal Coal Mine Health and Safety Act (30 USC, ss. 801(g), 815(c)(1),(2), (3), 816(a)(1)(b). Furthermore, in this country, laws on the disclosure of certain information ("whistleblower") protect the worker against retaliatory action in matters concerning the environment and the safety and health of the general public. Similar laws exist in 17 federal states; they generally prohibit the employer from taking retaliatory measures against a worker who has denounced fraud, abuse or violation of laws and regulations to a public authority. In this country, an Act of 1988 (Employee Polygraph Protection Act) puts a general limitation on the use of lie-detectors by employers and prohibits any reprisals against those who exercise one of the rights afforded to them by this Act (29 USC, s. 2001 et seq.).

[61] For example: *Austria*.

[62] *General Survey* of 1988, para. 226.

(d) Race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin

(e) Absence from work during maternity leave

118. The invalid reasons for termination of employment listed in paragraph 5(d) of the Convention encompass all the prohibited forms of discrimination in employment and occupation laid down in Article 1 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111). In addition, specific mention is also made of marital status and pregnancy,[63] and also family responsibilities, which are expressly mentioned in Article 8 of the Workers with Family Responsibilities Convention, 1981 (No. 156), as not constituting, as such, a valid reason for termination of employment.[64] The invalidity of absence from work for maternity leave as a reason for termination of employment embodies a basic principle enshrined since 1919 and reaffirmed in 1952 in ILO standards on maternity protection.[65]

119. *Race, colour, national extraction and social origin* have in common the fact that they are generally related to the presence of different ethnic and/or social groups within the same country. The concept of *race* does not in fact correspond to any precise scientific definition, the important point being the perception that those concerned have of their differences and the resulting attitudes in their relations with one another, in particular as regards employment. Although the most apparent, *colour* is just one of the characteristics of human beings. *National extraction* refers to the distinctions made between the citizens of a country depending on their place of birth, extraction or foreign origin. *Social origin* has been viewed mainly in terms of social stratification and can in particular cause problems when society is divided into "castes". As for *religion*, while it overlaps with protection of the right to freedom of conscience as it relates to employment, in relations between communities of different religions it can pose problems similar to those existing between racial or ethnic communities. With regard to *political opinion*, protection under the Convention implies that this must be recognized in respect of activities expressing or demonstrating non-violent opposition to political principles, given that protection of unexpressed or undemonstrated opinions would be irrelevant. Discriminatory dismissals targeted at members of ethnic, linguistic or religious minorities are covered by the various invalid reasons included in Article 5 of the Convention, such as race, national extraction and religion. Although the Convention does not seek to protect ethnic, religious or linguistic minorities as such, it does protect

[63] These invalid reasons may constitute direct or indirect discrimination on the basis of sex (General Survey of 1988, paras. 40 et seq.).

[64] Furthermore, in accordance with Para. 16 of the Workers with Family Responsibilities Recommendation, 1981 (No. 165), marital status, family situation or family responsibilities should not constitute valid reasons for termination of employment.

[65] See paras. 126-128 below.

the members of these minorities against any wrongful dismissal they may suffer as members of these minorities having ethnic or national characteristics, or professing certain religious beliefs or political opinions. Distinctions based on *sex* encompass those which are established explicitly or implicitly to the detriment of one sex or the other. In practice, it is mainly women who run the risk of having their employment terminated for reasons based on their sex.

120. *Marital status* more frequently constitutes a reason for termination of the employment of women than men, while *family responsibilities*, although in practice still borne by women more than by men, are a reason for dismissal that may increasingly affect men. During the preparatory work it was stated, with reference to Convention No. 156, that the term "family responsibilities" may be taken to refer to responsibilities of men and women workers "in relation to their dependent children" and "to other members of their immediate family who clearly need their care or support".[66]

121. Many countries have reported that several or all of the invalid reasons included in Article 5(d) also constitute invalid reasons for termination of employment under the national provisions. In some cases, the legislation mentions them specifically,[67] in others, constitutional or legislative provisions respecting equality refer to various prohibited grounds for distinction, although the extent to which these grounds are considered as invalid reasons for termination of employment depends on the bodies responsible for applying these provisions and, in particular, on the outcome of appeals.[68] The government of one country stated that protection against discrimination clearly extends to termination of employment even if the law does not expressly prohibit

[66] ILC, 68th Session, 1982, Report V(2), p. 22.

[67] For example: *Republic of Korea*: s. 8 of the Gender-Equal Employment Act: the employer shall not discriminate on the basis of gender with regard to retirement age, nor enter into a labour contract which provides that marriage, pregnancy or childbirth will be a cause for dismissal; *Swaziland*: s. 35(3)(d) of the Employment Act, 1980 (race, colour, religion, marital status, sex, national origin, tribal or clan extraction, political affiliation or social status).

[68] For example: *Canada*: Province of Ontario: the Human Rights Code prohibits all discrimination with regard to all aspects of employment, including dismissal for the following reasons: race, ancestry, place of origin, colour, ethnic origin, citizenship, beliefs, sex (including pregnancy), sexual orientation, age (between 18 and 65), record of offences, marital status, family status or handicap; *New Zealand*: under s. 28 of the Employment Contracts Act, the worker may lodge a complaint for discrimination on the basis of one of the following reasons: race, colour, sex, marital status, religious or ethical beliefs, ethnic or national origin; under the Human Rights Act 1993, discrimination based on the following criteria is prohibited: sex, marital status, religious or ethical beliefs, colour, race, ethnic or national origin, handicap, age, political opinion, employment status, family status or sexual orientation. Any dismissal for one of these reasons will be considered unjustified prima facie. The New Zealand Council of Trade Unions emphasized that there is no specific prohibition of dismissal on the grounds of social origin.

termination on the basis of one of the prohibited grounds.[69] Sometimes legislation does not include all the invalid reasons listed in Article 5(d), while other legislation refers to additional reasons such as age or disability.

122. The Committee has commented on the application of Convention No. 111 in relation to dismissals based on certain grounds of discrimination that constitute invalid reasons for termination of employment under Article 5(d) of Convention No. 158.[70] Since its 1988 General Survey of the application of the Discrimination (Employment and Occupation) Convention (No. 111) and Recommendation (No. 111), 1958, the Committee has furthermore noted with satisfaction progress made in the application of Convention No. 111 in relation to the various prohibited grounds of discrimination following the adoption of constitutional or legislative provisions or the modification of discriminatory practices.[71]

123. The Committee notes that in some countries recent legal provisions afford general protection against discrimination in employment or specific forms of protection against termination of employment on the basis of one or more of

[69] *United States*: 1964 Civil Rights Act (42 USC, ss. 2000 et seq): prohibition to discriminate on the basis of race, colour, sex, religion or national origin in employment covered by Title VII and prohibition to discriminate on the basis of race, colour or national origin under any programme receiving federal financial assistance where the primary objective of the assistance is to provide employment; other prohibitions are included in the following provisions: 42 USC, s. 1981 (extended to cover discrimination solely because of a person's ancestry or ethnic characteristics); Executive Orders 11246 and 11478. Acts of 47 federal states.

[70] See the observations made in 1994, for example, for the following countries: *Chile* (political opinion), *Egypt* (political opinion), *Germany* (political opinion), *Pakistan* (religion); ILC, 81st Session, 1994 Report III (Part 4A).

[71] For example: *Barbados*: in 1989 the Committee noted the repeal of provisions under which a woman public servant may be obliged to leave the public service in the event of her marriage; *Bulgaria*: in 1992, the Committee noted that under art. 6 of the Constitution of 12 July 1991, all persons are born free and equal in dignity and rights; that citizens are equal before the law; and that there are no privileges or restriction of rights on the grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status or property status. It also noted that s. 8(3) of Act No. 100 of 9 Dec. 1992 amending the Labour Code provides that, in exercising labour rights and obligations, no discrimination, restrictions or privileges can be made on grounds of nationality, origin, sex, race, political convictions, religious beliefs, membership of trade unions and other social organizations or movements, or social or marital status; *Dominican Republic*: Fundamental Principle VII of the Labour Code of 1992 prohibits all discrimination, exclusion or preference on the basis of sex, age, race, colour, national origin, social origin, political opinions, trade union activities or religious beliefs; *Poland*: the Committee noted in 1990 that an Act of 24 May 1989, as amended by an Act of 7 Dec. 1989, provided for the reinstatement of persons dismissed since Aug. 1980 for their political opinions, religion, trade union membership or trade union or self-management activities, and that an Amnesty Act had annulled convictions, inter alia, for acts of protest committed after 31 Aug. 1980. In 1992, the Committee noted the elimination of political criteria as a basis for the removal from office of judges, as well as the fixing of a period of time for the nomination of judges who had previously been dismissed from their duties on account of their political opinion or activities, and who had the necessary qualifications.

the reasons considered as invalid under Article 5(d) of the Convention.[72] In *Namibia*, for example, the new Labour Act provides that a dismissal decided for reasons pertaining, inter alia, to sex, race, colour, ethnic origin, religion, belief, social or economic status, political opinion or marital status is not valid.[73]

124. Furthermore, the Committee notes that some countries have recently adopted protective legislation against sexual harassment at the workplace.[74]

125. The Committee studied national situations with regard to family responsibilities and marital status as invalid reasons for termination of employment in its 1993 General Survey on the Workers with Family Responsibilities Convention (No. 156) and Recommendation (No. 165), 1981. The Committee noted[75] that very few countries had legislated to make family responsibilities an explicit ground on which discrimination in respect of all aspects of the employment relationship was proscribed. Those that had done so had clearly taken this action within the framework of wider measures to ensure equality of opportunity and treatment in employment. In addition to the countries mentioned in that General Survey,[76] the Committee notes further information and developments in this respect. In *Australia*, for example, the New South Wales Industrial Relations Commission considered in one case that the dismissal of a worker following his absence from work to support his wife (in a difficult birth) during the birth of their child was, in the circumstances of the case, a harsh, unfair and unjust dismissal of the highest degree.[77] In *Croatia* an employment relationship cannot be terminated for a single or adoptive parent

[72] For example: *Botswana*: The Employment (Amendment) Act of 1992; *China*: The Labour Law of 5 July 1994, which came into force on 1 January 1995: workers will not be discriminated against in employment on the basis of their ethnic community, race, sex or religious belief; *Equatorial Guinea*: General Labour Act No. 2 of 1990; *Madagascar*: Constitution of 19 Aug. 1992; *Sweden*: protection against termination of employment applies to both direct and indirect gender discrimination, Equal Opportunities Act of 1991.

[73] *Namibia*: s. 452(b) of the Labour Act, 1992.

[74] For example: *Argentina*: Decree No. 2385/93 including the case of sexual harassment in the legal rules governing the public service; *Belgium*: Royal Order of 18 Sep. 1992 organizing the protection of workers against sexual harassment at the workplace; *France*: Act No. 92-1179 of 2 Nov. 1992 concerning abuse of authority with regard to sexual matters in labour relations, and amending the Labour Code and the Code of Penal Procedure. In this country, an appeals body recently ordered the immediate reinstatement of two workers who had had their employment terminated after having filed complaints for sexual harassment against the woman in charge of the section (Industrial Tribunal of Valenciennes, decision dated 27 July 1994).

[75] *Workers with family responsibilities*, General Survey, paras. 118-127.

[76] The Committee referred, for example, to the following situations: *Australia*: the Government's intention to amend the Sex Discrimination Act, 1984, in order to prohibit dismissals on the ground of family responsibilities; *Canada*: provisions in the employment standards legislation of Canadian jurisdictions that regulate the right to different forms of family leave also provide employment security safeguards for persons wishing to avail themselves of these forms of leave; *Greece*: Act No. 1483 of 8 Oct. 1984 specifies in particular that family responsibilities shall not be grounds for terminating the employment relationship of the workers concerned.

[77] *Australia*, IRC 1534 of 1992.

with a child seven years old or less, or in the case of a parent or adoptive parent with three or more dependent children.[78] In the *United States*, provisions with regard to family/parental leave were adopted recently.[79] In *France*, parental leave to bring up a child has been extended to all workers, whatever the size of the undertaking, and unpaid leave to care for sick children has been introduced.[80] In *Italy*, the Constitutional Court judged as constitutional a provision that grants the father of a child of a female worker the possibility to take, instead of the mother, certain leave intended for child welfare and maternity protection.[81]

126. Protection against termination of employment in the event of *pregnancy* or *absence from work during maternity leave* is an essential component of protection against termination of employment on grounds of sex, and it is also an important aspect of policies of equality in employment and occupation.[82] This guarantee aims to prevent women from being discriminated against during pregnancy and maternity and to save female workers the material and moral consequences that the loss of their employment could have both for themselves and for their children. This concern has been embodied, in so far as maternity leave is concerned, in the two Conventions dealing with this issue, namely Conventions Nos. 3 and 103, in a provision prohibiting the termination of a woman's employment during her maternity leave and, under certain conditions, during a period immediately before or after that leave.[83]

[78] *Croatia*: s. 78 of the Labour Relations Act.

[79] *United States*: Family and Medical Leave Act of 5 Feb. 1993 to grant family and temporary medical leave under certain circumstances.

[80] *France*: Act No. 94/629 of 25 July 1994 respecting the family.

[81] *Italy*: Decision No. 150, dated 14 and 21 Apr. 1994.

[82] The Declaration of Philadelphia (Part III, para. (h)) places maternity protection amongst the aims and objectives of the ILO. Maternity is a state that requires differential treatment to achieve genuine equality and, in this sense, it is more of a premise for the principle of equality than an exception from that principle. *General Survey on equality in employment and occupation*, para. 143.

[83] Under the terms of the Maternity Protection Convention, 1919 (No. 3) (Art. 4), where a woman is absent from her work during her maternity leave or remains absent from her work for a longer period as a result of illness medically certified to arise out of pregnancy or confinement and rendering her unfit for work "it shall not be lawful, until her absence shall have exceeded a maximum period to be fixed by the competent authority in each country, for her employer to give her notice of dismissal during such absence, nor to give her notice of dismissal at such a time that the notice would expire during such absence". The Maternity Protection Convention (Revised), 1952 (No. 103), contains a similar provision (Art. 6) prohibiting dismissal not only during the normal leave period, that is to say at least 12 weeks, but also during the period by which this leave is extended on account of a delay in confinement or illness arising out of pregnancy or confinement.

127. Many countries protect pregnant women or new mothers against termination of employment.[84] This protection often covers the entire pregnancy, of which the employer must be notified, generally by means of a medical certificate.[85] In some cases it only covers a few months before confinement[86] or only the period of absence for maternity leave.[87] After confinement, the length of the period varies depending on whether the legislation of a country covers the postnatal period,[88] the nursing period[89] or periods other than the postnatal and nursing periods.[90] In *China*, for example, the law prohibits the dismissal of a female worker because she gets married, becomes pregnant, takes maternity leave or nurses her infant.[91] In one country, the guarantees provided for a biological mother have been extended to an adoptive mother, the date of confinement corresponding to the date on which the adoption officially took effect.[92] Some countries establish a presumption that termination of employment during the period of protection is based on pregnancy or maternity.[93] In other countries, it is prohibited to discriminate on the grounds

[84] For example: *Argentina, Austria, Azerbaijan, Barbados, Belgium, Brazil, Burkina Faso, Cambodia* (Constitution), *Chile, Colombia, Costa Rica, Czech Republic, Equatorial Guinea, Finland, France, Germany, Greece, India, Indonesia, Panama, Paraguay, Peru, Russian Federation, Spain, Tunisia, United Kingdom, United States, Uruguay, Venezuela*. (In some of these countries, protection is called "fuero maternal", along the same lines as "fuero sindical", or trade union immunity.) It should be noted that, although in some countries legislation protects pregnant women and new mothers against dismissal, discriminatory practices prior to recruitment oblige women in some countries to have a more or less secret pregnancy test. Such practices appear to exist in *Brazil, Chile* and *Mexico*. In *Venezuela*: s. 381 of the Organic Labour Act of 1990 prohibits practices of this kind (s. 381); in *Brazil*, certain collective agreements have similar provisions (ILO-*Instituto de la Mujer*, *"Regulación del Trabajo de la Mujer en America Latina"*, 1993, pp. 32 and 33). See also ILO "Maternity and work", *Conditions of Work Digest*, Vol. 13, 1994.

[85] For example, *Argentina, Brazil, Chile, Colombia*.

[86] For example: *Lebanon, Peru*.

[87] For example: *Cameroon, Malta, Syrian Arab Republic, Tunisia*.

[88] For example: *Uruguay*: Act No. 12030 of 1953.

[89] For example: *Colombia*: three months (s. 239 of the Labour Code); *Costa Rica*: three months (s. 94 of the Labour Code).

[90] For example: *Azerbaijan*: three years; *Chile*: one year, which is added to the 12 weeks of postnatal leave (s. 201 of the Labour Code); *Argentina*: one year (s. 179 of the Labour Code); *Venezuela*: one year (s. 384 of the Labour Code); *Guinea*: nine months (unpaid leave); *Brazil*: six months (s. 396 of the Codification of Labour Laws).

[91] s. 26 of the Act of 1992 concerning the protection of the rights and interests of women (s. 25 of the same Act provides that women shall receive special protection during their menstrual periods, pregnancy, maternity leave and nursing).

[92] *Colombia*: s. 236 of the Labour Code, as amended by Act No. 50 of 1990.

[93] For example: *Colombia*: s. 239 of the Labour Code.

of maternity.[94] In *Spain*, in a June 1994 decision, the Constitutional Court, in connection with the scope of sex discrimination, ruled that failure to renew a temporary contract on account of pregnancy was comparable to a dismissal in violation of fundamental rights.[95]

128. Legislation in some countries allows a worker's employment to be terminated if necessary during pregnancy or postnatal leave for reasons related to the reorganization of the enterprise,[96] but with certain restrictions, and sometimes only with prior authorization.[97] Periods of absence for maternity leave vary,[98] with postnatal leave sometimes being longer than prenatal leave.[99] Prenatal leave can sometimes be partially or entirely deferred until after confinement.[100] The protection of the Convention applies in all circumstances, whatever the period of prenatal or postnatal leave provided for in the national legislation.

Invalid reasons for termination of employment in the Recommendation

129. Under Paragraph 5 of the Recommendation, "the following should not constitute valid reasons for termination:

(a) age, subject to national law and practice regarding retirement;

(b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice."

(a) Age

130. The preparatory work reveals that the retirement age referred to in the Recommendation may be lower than that at which entitlement to an old-age

[94] For example: *Canada*, Province of Manitoba: s. 9(2)(f) of the Human Rights Code: sex, pregnancy, the possibility of pregnancy or circumstances related to pregnancy; *Malaysia*: an employer who dismisses a woman during maternity leave is liable to prosecution, s. 40(3) of the Employment Act.

[95] TC 1.ª S 173/1994 of 7 June.

[96] For example: *Austria, Namibia.*

[97] For example: *Austria*, notice can only be given after court authorization and because the employment relationship cannot be continued without being detrimental to the undertaking, or if it is due to a reduction of staff (or the closing down of the establishment); *Dominican Republic*: s. 233 of the Labour Code (prior authorization of the Minister); *Germany*: s. 9 of the Maternity Protection Act (exceptionally serious difficulties, authorization of the authorities).

[98] For example: 30 days in the *Republic of Korea*, at least six weeks before and six weeks after confinement in *Argentina*, *Colombia, Mexico* and *Uruguay*; three months after confinement in *China*.

[99] For example: *Chile*, six weeks before and 12 weeks after confinement; *Costa Rica*: one month before and three months after confinement; *Venezuela*: six weeks before and 12 weeks after confinement.

[100] For example: *Argentina, Colombia, Uruguay*.

pension begins. In fact, an amendment to insert the following text: "age, subject to national law and practice regarding retirement at or after the age normally qualifying for an old-age benefit", was not accepted. Several Government members indicated that this amendment would raise problems in their countries since, under national law and practice, in situations of crisis, it was possible for the employment of workers near retirement age to be terminated with considerable income protection until the age of retirement. The Office confirmed that if this amendment were adopted, early retirement effectuated by termination of employment by the employer, with financial support not in the form of an old-age benefit, would not be authorized. [101]

131. In some countries, legal provisions have been adopted to protect older workers against discrimination in general and termination of employment on account of age in particular. These measures are based on the idea that the assessment of the work of a person who has reached a certain age should be based on the abilities he displays and not on his age. In some cases, legislation prohibits discrimination on account of age or the termination of a person's employment on the ground of age. [102] In one country, enterprise practice seems to be in favour of an extension of the compulsory retirement age. [103] In the *Russian Federation*, the Constitutional Court has described the dismissal of workers who are entitled to a full old-age pension, once they reach retirement age, without taking the circumstances into consideration, as being contrary to the Constitution and to the Declaration of 1991 of the rights of the individual and

[101] ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/6. See also the Older Workers Recommendation, 1980 (No. 162), Paras. 5(c), 21 and 22.

[102] For example: *Canada*: Provinces of Ontario, New Brunswick: the Human Rights Code and Act prohibit any discrimination on the basis of age; Province of Quebec: s. 122.1 of the Labour Standards Act prohibits the dismissal, suspension or retirement of an employed person because he has reached or passed the age or the number of years of service applicable for retirement; *New Zealand*: s. 22 of the Human Rights Act, 1993: "Age" is defined as beginning at 16 years of age and ending at the time when the worker is entitled to receive a state pension; *Singapore*: s. 4(1) and (2) of the Retirement Age Act, 1993: notwithstanding any law, contract or collective agreement, retirement age shall not be less than 60 years of age, or such other age, up to 67 years, as may be prescribed by the Minister. No employer shall dismiss on the ground of age any employee who is below 60 years of age or the prescribed retirement age; *Spain*: the Constitutional Court has decided that additional provision No. 5 of the Worker's Charter setting the obligatory retirement age at 69 years of age was unconstitutional given the fact that it established the incapacity of a worker from a specific time and the immediate, unconditional extinction of the employment relationship at that age; *United States*: Age Discrimination in Employment Act, 1967. This Act also outlaws the retaliatory discharge of an employee based on an employee's participation in the enforcement of the Act. The laws of a large number of federal states also prohibit dismissal on account of age. Furthermore, in this country, the obligatory age for retirement has been withdrawn from the legislation of many states for almost all public service positions.

[103] *Japan*: ILO, CONDI/T: "Older workers: Conditions of work and transition to retirement", working paper, Japan.

of the citizen. [104] In other countries, however, a worker who is eligible for full old-age benefits may have his employment terminated, [105] although legislation sometimes specifies a minimum age. [106]

(b) Military service

132. National provisions often guarantee employment security for workers called to serve their country during military service. In some countries, the contract is suspended for the duration of the military service, sometimes subject to certain exceptions and conditions, for example the condition that the worker should inform the employer that he wishes to resume his employment. [107] Sometimes employment security is guaranteed not only during military service, but also for a certain period of time after its completion. [108] As far as insurance plans and other benefits are concerned, in one country a worker's absence for military service is treated as leave. [109] In another country, employment security is guaranteed to persons who have volunteered for military training. [110]

[104] *Russian Federation*: Constitutional Court, 4 Feb. 1992, *Bulletin of the People's Congress of the Russian Federation and of the Supreme Soviet of the Russian Federation*, 1992, No. 13. The Act of 12 Mar. 1992 repealed the provisions that were the basis of these practices.

[105] For example: *Azerbaijan*.

[106] For example: *Bulgaria*: s. 328(10) of the Labour Code: men and women workers may not be dismissed before 60 and 55 years of age, respectively.

[107] For example: *Belgium*: the conscripted worker may not have his employment terminated other than for a reason which is sufficiently unrelated to the performance of his military obligations; *Cameroon*: s. 32 of the Labour Code; *Czech Republic*: s. 48 of the Labour Code: it is prohibited to give notice to a worker who has been called up until two weeks after the end of service. *Germany*: s. 2(a), of the Protection against Dismissal Act. The contract is suspended; ordinary termination of employment is prohibited; extraordinary termination of employment on the basis of military service is admissible in small undertakings, but only on condition that: the draftee is not married; the employer cannot reasonably be required to take him back if he has employed another worker; the dismissal is notified two months after the end of service; *Guinea*: ss. 66 and 67 of the Labour Code; *Niger*: s. 46 of the Labour Code; s. 27 of the interoccupational collective agreement: the contract is suspended; the worker has every right to take up his employment again at the end of his service; he must inform the employer a month at most after his discharge from service if he wishes to take up his employment again.

[108] For example: *Greece*: for one year after completion of service.

[109] For example: *United States*: Veterans' Re-employment Rights Act (VRR): the employee cannot be discharged without cause for one year after the restoration of employment. Furthermore, at least six federal states prohibit discrimination in employment because of an employee's compulsory military obligations.

[110] *New Zealand*, s. 6 of the Volunteers Employment Protection Act.

(c) Other civic obligations

133. During the preparatory work, the Office stated that it had in mind, when including these words in the questionnaire in Report VIII(1), such obligations as the duty to participate in elections and jury service. [111]

Other invalid reasons included in national provisions

134. In many countries, constitutional or legislative provisions regarding equality refer to various invalid reasons other than those mentioned in Convention No. 158 and Recommendation No. 166, or to various prohibited grounds for distinction in addition to those included in Convention No. 111 (Article 1). As the Committee has stated, [112] the extent to which these grounds are considered to be invalid reasons for termination of employment will depend on the decisions of the bodies responsible for applying these provisions, and in particular on the outcome of appeals. The prohibited grounds for distinction refer for example to citizenship, [113] sexual orientation, [114] the existence of a police record, [115] level of education, [116] or being a trainee in a vocational training school. [117] Sometimes the legislation explicitly mentions certain reasons as not constituting valid reasons for termination of employment, such as participation in a strike. [118]

135. In an increasing number of countries, *persons with disabilities* are protected against discrimination [119] and often benefit from certain guarantees against termination of employment. In the words of the United States Congress: "individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our

[111] ILC, 67th Session, 1981, *Record of Proceedings*, p. 30/7.

[112] See para. 121 above.

[113] For example: *Canada*: Province of Ontario: s. 5 of the Human Rights Code.

[114] For example: *Canada*: Province of Manitoba: s. 9(2) of the Human Rights Code; Province of Ontario, op. cit.; Province of New Brunswick, s. 3(1) of the Human Rights Act.

[115] For example: *Canada*: Province of Ontario.

[116] For example: *Angola*: art. 18 of the Constitution.

[117] For example: *Greece*.

[118] For example: *Finland*: s. 37(2) of the Contracts of Employment Act, 1970; *France*. See also *General Survey on freedom of association and collective bargaining*, 1994, para. 139.

[119] For example: *Australia, Canada, Philippines, United States*. *Canada*: Province of Ontario: s. 5 of the Human Rights Code; Province of Alberta: s. 4 of the Human Rights Act; Province of New Brunswick: s. 3(1) of the Human Rights Act (physical or mental disabilities); Province of Manitoba: s. 9(2) of the Human Rights Code (physical or mental disability or related characteristics or circumstances, including reliance on a guide dog or other animal assistance, a wheelchair, or any other remedial appliance or device).

society".[120] The Americans with Disabilities Act (ADA) of 1990,[121] which gives a comprehensive mandate for the elimination of discrimination against individuals with disabilities, prohibits discrimination against a qualified individual under the law, in particular as regards discharge.[122] In the *Philippines*, the Magna Carta for Disabled Persons of 1992 prohibits any discrimination in the employment of a disabled person with regard to termination of employment.[123] In *Australia* it is unlawful for an employer to discriminate against an employee on the ground of the employee's disability by dismissing the employee.[124] In several countries, the employment of persons with disabilities can only be terminated with the consent of a competent authority.[125] The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983 (No. 159), lays down the principle of equality of opportunity and treatment between disabled workers and workers in general, in particular, as stated in the Recommendation (No. 168), in respect of access to and retention of employment. The Committee considers that the protection of persons with disabilities is of particular interest. It will carry out a General Survey on the standards concerning vocational rehabilitation, which will be submitted to the Conference in June 1998.

Temporary absence from work because of illness or injury

136. Article 6 of the Convention provides that "temporary absence from work because of illness or injury shall not constitute a valid reason for termination. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined

[120] In its 1988 *General Survey on equality in employment and occupation*, paras. 70 and 71, the Committee noted that several States have been led to examine the consequences that disabilities, and by extension the past or present mental or physical state of health of a person, may have on employment. It emphasized that, while state of health should be taken into account in assessing a person's aptitude for a specific job, he or she should not be subject to the burden of proving his or her aptitude where the consequences of past or present diseases are concerned.

[121] *United States*: The Americans with Disabilities Act ((ADA) 42 USC, s. 12101(b)(1)).

[122] 42 USC, s. 12112(a). Other provisions protect workers in some cases, namely s. 503 of the Rehabilitation Act and s. 402 of the Viet Nam Era Veterans' Readjustment Assistance Act. 29 USC, s. 793, and 38 USC, s. 4212.

[123] The termination of the services of a disabled employee by reason of his disability, unless the employer can prove that he impairs the satisfactory performance of the work involved and provided that the employer has first sought to provide reasonable accommodation for persons with disabilities, constitutes discriminatory termination of employment.

[124] s. 15 of the Disability Discrimination Act, No. 135 of 1992.

[125] For example: in *Austria* (Disabled Persons Employment Act) termination of a disabled person's employment can only take place with the authorization of the competent invalidity board; *Germany*: Notification of 26 Aug. 1986 to promulgate a consolidated text of the Severely Disabled Persons Act: an employer cannot usually terminate the employment contract of a severely disabled person without the prior authorization of the central assistance office.

in accordance with the methods of implementation referred to in Article 1 of this Convention".

137. Under this Article, the termination of the employment relationship because of a temporary absence due to illness is, in principle, not valid; this reason is thus comparable to those listed in Article 5 of the Convention. The Convention allows, however, for certain restrictions that can be determined by national methods of implementation. The Convention does not define the concept of illness or injury. These terms are commonly accepted as meaning both illness and injury that are not related to work and occupational illness and injury. Nor does it define the concept of temporary absence; however, the term "temporary" implies in itself that the protection may be restricted to a certain length of absence. Moreover, the Convention does not specify what sort of restrictions might be established. One of the restrictions could be related to repeated absences as a result of illness.[126] It should also be mentioned that breach of contract following extended leave due to illness or injury if permitted by national law should be seen as a termination that would normally give rise to severance allowances and other similar benefits, and not as a breach of contract by the employed person. The concept of temporary absence seems to be defined by national methods of implementation. It is essentially defined in terms of its length, which varies considerably, and can range from some months to several years;[127] many countries have adopted a duration of six months. In practice, temporary absence generally results in a suspension of the employment contract for a specific period (with the employer continuing to pay benefits or coverage being supplied in part or in full by social security benefits) and a prohibition to terminate employment during this period or during a prescribed period.[128] Although the Convention leaves the definition of temporary absence to national provisions, the Committee considers that where the absence is defined in terms of its duration, it should be compatible with the aim of the Article, which is to protect a worker's employment at a time when, for reasons of *force majeure*, he is unable to carry out his obligations. In other countries, the main criterion is capacity for work. For example, in one country, an illness suffered by a worker cannot be deemed to constitute grounds for termination of employment in so far as it has not caused a substantial and permanent reduction of capacity for work.[129]

[126] ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/8.

[127] For example: 30 days: *Republic of Korea*; four months: *Azerbaijan, Russian Federation*; six months: *Benin, Cameroon, Eritrea, Iraq, Kuwait, Madagascar, Senegal* (extended for long-term treatment), *Syrian Arab Republic, Zaire*; one year: *Hungary, Indonesia*; two years: *Netherlands*.

[128] *Austria*: the Federal Chamber of Workers considers it unsatisfactory that termination of employment is not prohibited in the case of illness or injury; *New Zealand*: the Employment Tribunal is competent to assess justification on grounds of temporary absence due to illness or injury; workers are entitled to five days' special sick leave.

[129] For example: *Finland*: s. 37 of the Contracts of Employment Act, 1970.

138. As regards victims of occupational injuries and diseases, the Committee considers that it would be advisable that they enjoy additional protection. This sometimes involves an extension of the period for which the contract is suspended. In some cases, the legislation provides that the contract shall be suspended for the whole period of incapacity following the occupational injury.[130] The Committee notes with interest that in some countries a person who has suffered an occupational injury or disease enjoys additional protection. In *China*, the employer does not have the right to terminate a worker's employment if the worker has partially or entirely lost his capacity to work as a result of an occupational disease or injury.[131] In *France*, a victim of such a disease or injury may not be dismissed unless the employer justifies it either on the grounds of serious misconduct or because it is impossible to continue the contract for a reason that is unconnected with the disease or injury.[132]

139. When a worker is unfit to return to his former job after a period of suspension of the contract of employment, some countries have adopted provisions whereby the employer is obliged to place him in another job.[133] This obligation exists in *Bulgaria* in cases of permanent incapacity or medical contra-indications, and also in *France* for all cases of physical incapacity (whether or not such incapacity is the result of an occupational disease or injury).[134]

140. A medical certificate is generally required for absence of more than a specified number of days.[135] In general, the worker must quickly inform the employer of his absence due to illness or injury, and send him a medical certificate within a certain period.

141. The Committee notes that sometimes a worker has only a very short period of time to inform his employer.[136] It would be advisable that this period be reasonable, in keeping with the means of communication available to the worker and not be interpreted restrictively if the worker is clearly acting in good

[130] For example: *Burundi, Eritrea, Senegal, Zaire*.

[131] *China*: s. 29(1) of the Labour Law of 1994. This also seems to be the case in *Mauritius*.

[132] *France*: s. L.122-32-2 of the Labour Code; *Mexico*: s. 499 of the Federal Labour Act.

[133] For example: *Australia*: various state workers' compensation statutes require alternative suitable employment to be provided by the employer to a partially incapacitated worker. This has been interpreted in one recent case as requiring an employer to create a job or a superannuary or if necessary terminating the employment of another employee to provide a partially incapacitated worker with suitable employment; *Guinea*; s. 57 of the Labour Code; *Senegal*: s. 21 of the interoccupational agreement.

[134] *Bulgaria*: s. 325 of the Labour Code, 1992; *France*: s. L.122-32-5 of the Labour Code, as amended by Act No. 92-1446 of 31 Dec. 1992.

[135] For example: *Madagascar, Mauritius, Namibia*.

[136] For example: *Luxembourg*: under the collective contract of state workers dated 21 June 1994, a worker must notify his superior or the authorities within two hours at most, in so far as his state of health permits him to do so.

faith or if *force majeure* has prevented him from notifying his employer within the prescribed period.

142. Limitations can also be the consequence of repeated absences due to illness, such absences being sometimes seen as disturbing the smooth running of the enterprise. Specifically, in the case of persons infected by the human immunodeficiency virus (HIV) and those suffering from acquired immunodeficiency syndrome (AIDS), the statement resulting from a joint consultation held in 1988 by the World Health Organization (WHO) in collaboration with the ILO recommends that workers infected with HIV who are in good health be treated in the same way as other workers, and that those with HIV-related illnesses, including AIDS, be treated the same as any other ill workers. According to this statement, HIV infection is not a cause for termination of employment; persons with HIV-related illnesses should be able to work as long as medically fit for available, appropriate work.[137] With regard to such illnesses, which may require periodic treatment, the Committee deems it particularly important to carefully weigh and evaluate the repercussions that absences of this kind may have in practice on the operation of the enterprise, bearing in mind the difficult consequences that termination of employment can entail for the worker.[138] The Committee points to the necessity of taking appropriate measures to protect the persons who work in contact with those having such illnesses.

[137] Statement from the consultation on AIDS and the workplace, 27-29 June 1988, doc. WHO/GPA/INF/88.7 Rev.1.

[138] In *Canada* the courts have stated that HIV status cannot be used as an automatic ground for dismissal from employment, and have recognized HIV and AIDS as disabilities under federal and provincial legislation (ILC, 80th Session, 1993, Report III (Part 4A), p. 327; Convention No. 111, *Canada*).

CHAPTER IV

Procedures relating to termination of employment

143. An effective system of protection against unjustified termination of employment must include not only a requirement that dismissals must be based on valid reasons, but procedures to ensure compliance with this requirement. These procedures can be divided into two categories: those to be observed before or at the time of termination and those governing appeals against termination including compensation if it is found that there was no valid reason for termination of employment.

I. Procedure prior to or at the time of termination

144. Article 7 of the Convention provides that "the employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity".

145. The wording of Article 7 reflects the basic principle of the right to defence. When a person risks a sanction as serious as termination of employment, which may jeopardize his career and sometimes his future, it is essential that he be able to defend himself. This Article refers not only to reasons related to the worker's conduct, but to those concerning his performance, such as unsatisfactory performance. However, it does not refer to termination of employment for reasons based on the operational requirements of the undertaking, establishment or service, in respect of which collective procedures are set out in Articles 13 and 14 of the Convention.

146. Article 7 establishes the principle that the worker, before his employment is terminated, must have an opportunity to defend himself against the allegations made, which presupposes that the latter should be expressed and brought to his attention before the termination. The Convention does not state explicitly what form this defence should take, nor the form in which the allegations should be presented. It is important that the allegations are expressed and communicated to the worker without ambiguity and that the worker is given a real opportunity to defend himself.

147. It is clear from the preparatory work that the opportunity for a worker to defend himself is related to the possibility of his being afforded an

opportunity to be heard by the employer, without there being a need for an adversarial proceeding. In reply to the proposed text submitted to the Conference by the Office after the first discussion, which provided that the employment of a worker should not be terminated for reasons related to his conduct or performance before being afforded a hearing by the employer and given the opportunity to defend himself against the allegations made, three governments [1] proposed to delete the reference in this paragraph to the word "hearing", which they believed implied a quasi-judicial procedure, with a view to greater flexibility. The Office pointed out that inasmuch as the word "hearing" might have such a connotation it felt that this reference could well be deleted without affecting the substance of this provision, according to which a worker should not have his or her employment terminated for reasons of conduct or performance before being given an opportunity to defend him- or herself against the allegations made. [2]

148. Over and above the terms of Article 7 and its meaning, which is to allow workers to be heard by the employer, the purpose of this Article is to ensure that any decision to terminate employment is preceded by dialogue and reflection between the parties.

149. Article 7 provides that a worker should be given an opportunity to defend himself, "unless the employer cannot reasonably be expected to provide this opportunity". The Convention does not specify what these reasons might be or the meaning of the word "reasonably". The exception is worded in flexible terms: it does not require that the defence be impossible, but merely that the employer cannot reasonably be expected to consent to it. During the preparatory work, in the second discussion, a number of governments proposed an amendment to add the following words at the end of the first part of the Article: "unless he is found guilty of serious misconduct, that is to say misconduct of a nature such that the employer could not reasonably be required to give him this opportunity." This amendment was withdrawn in favour of the text proposed by a working party. [3] It is for the bodies responsible for the application of national provisions to ensure that this provision of the Convention is applied in good faith.

150. It should be noted that the opportunity for a worker to defend himself must be given before employment is terminated. Even if the worker is entitled to procedures after the termination of employment, and even if the termination is not considered as final until the appeals procedures are exhausted, it is

[1] *Netherlands, United Kingdom, United States.*

[2] ILC, 68th Session, Geneva, 1982, Report V(2), p. 27. This interpretation is borne out by the reply of the Government of the United States to the first questionnaire. It supported the right of the worker to defend himself against allegations of misconduct or poor performance. It should not be the purpose of this provision to turn this "hearing" into an adversarial proceeding when it might be a means of discovering underlying causes of difficulties and developing plans for correcting them. ILC, 67th Session, 1981, Report VIII(2), p. 51.

[3] ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/8.

necessary for the application of Article 7 that the worker be given an opportunity to defend himself "before his employment is considered to have been terminated".[4]

151. The right of a worker to defend himself laid down in Article 7 of the Convention is one of the most important aspects of the procedural requirements which employers must fulfil in many countries before they may take a decision to terminate the employment of a worker, the essential purpose of which is to ensure that the worker has an opportunity to express his point of view. These procedures are established by legislation, collective agreement and works rules, or observed in personnel practices and upheld by juridical decisions.[5] They sometimes take on the more formal nature of an adversarial procedure beyond the requirements of Article 7 of the Convention.

152. In some countries the worker's right to be heard is a requirement of general application which must be met not only in the event of alleged misconduct, but for other reasons in connection with the worker[6] or based on the operational requirements of the enterprise.[7] In other cases, this right is recognized in the event of misconduct and in this case a detailed disciplinary procedure is often established, with termination of employment being the most serious sanction applicable.[8] In this case, the right to be heard is an essential phase of the disciplinary procedure. The disciplinary procedures are based on the idea that the sanction of disciplinary termination of employment should not be applied without following a procedure so as to ensure that the worker has the right to defend himself and that the sanction is commensurate with the misconduct. In many cases, these procedures were first applied to civil servants, but they are now in force in many sectors. In some countries, allegations are

[4] ILC, 77th, 79th and 81st Sessions (1990, 1992 and 1994), Report III (Part 4A): Convention No. 158: observation concerning *Spain*.

[5] For example: ***Bangladesh, Comoros, Egypt, Mauritius, Pakistan, Portugal, Russian Federation. Hungary***: s. 89(4) of the Labour Code, 1992: before giving notice of termination of employment for reasons connected with the performance or behaviour of an employed person, the employer has to give the employee the opportunity to answer the criticisms directed against him, unless this cannot be done in view of the circumstances of the case; *Zambia*: the fact that a person must be heard is a principle of natural justice.

[6] For example: *Portugal*: behaviour and work performance.

[7] For example: *France*: s. L.122-14 of the Labour Code: a worker is heard irrespective of whether employment is terminated for reasons in connection with the worker or for economic reasons. The provisions are not applicable when the employment of a specific number of workers is terminated for economic reasons where there is a works council or staff delegates in the enterprise.

[8] For example: *Croatia*: ss. 59-68 of the Law on basic employment rights; ss. 64-67 of the Labour Relations Act.

notified to the worker in writing[9] or the worker may request a written explanation[10] and request an interview.[11]

153. The Government of *New Zealand* stated that the worker must be given a real opportunity to be heard and offer an explanation of his conduct or performance before a final decision is made with respect to termination of employment.[12] In *Australia* an employer cannot terminate an employee's employment for reasons related to the employee's conduct or performance unless the employee has been given the opportunity to defend himself or herself against the allegations made or the employer could not reasonably be expected to give the employee that opportunity.[13] In another country, a prior interview is required only in enterprises employing at least 150 workers.[14]

154. Where there is a prior interview and in order that this should not be a mere formality to which the worker is summoned without any advance notice or preparation, the national methods of implementation sometimes establish conditions concerning the form, content of the convocation and time period which must elapse between the convocation and the interview,[15] as well as the time period within which termination of employment must be notified after the interview.[16]

155. The Committee notes that one government stated that the draft Labour Code currently under examination requires the employer to allow the worker to defend himself before employment can be terminated.[17]

156. *Paragraphs 7 to 13 of the Recommendation* contain a number of supplementary provisions concerning procedure prior to or at the time of

[9] *Bangladesh*.

[10] *Azerbaijan*.

[11] *Bangladesh*.

[12] Irvines Freightlines Ltd. v. Cross, 1993, 1 ERNZ 424. The Employment Court stated: "It is ... of the essence of that principle of natural justice, namely the right to be heard, that this right in a disciplinary setting affecting a particular employee, should be exercisable by that employee in a real and purposeful hearing before the person or persons who are to decide how the disciplinary infraction, if proved or admitted, shall be dealt with."

[13] s. 170 DC of the Industrial Relations Act, 1988, as amended by the Industrial Relations Reform Act, 1993.

[14] *Luxembourg*.

[15] For example: *France*: before any decision is taken, the employer or his representative must summon the worker by registered letter or letter handed directly to the worker who must sign for its receipt, indicating the purpose of the convocation. During the hearing, the employer is required to state the reason(s) for the proposed decision and to note the worker's explanations; *Luxembourg*: the worker must be convoked by registered letter.

[16] For example: *Luxembourg*: at the earliest one day after the prior interview and no more than eight days afterwards.

[17] *Madagascar*: the draft text also stipulates that the worker may be assisted by a person of his own choosing.

termination of employment including assistance by another person, misconduct which may give rise to termination, the role of workers' representatives, the form of the notification of termination of employment and the reasons therefore. Some of these procedural safeguards are applicable in the event of misconduct or unsatisfactory performance, while others are more generally applicable to all types of termination of employment. The Committee is aware of criticism that in some States termination procedures and their application by the courts and tribunals, based on a strict and rigid adherence to procedural rules, take a long period of time involving heavy social and economic costs. The Committee nevertheless thinks that the protection against unjustified termination of employment provided for in the Convention should not be denied to the workers merely because of such costs.

Assistance

157. Under Paragraph 9 of the Recommendation, "a worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation".

158. In several countries, the worker has the right to be assisted by another person [18] who is often a staff delegate or trade union representative, [19] or who may be a person chosen by the worker from the staff of the enterprise [20] or an adviser from outside the enterprise. [21]

Repeated misconduct or unsatisfactory performance — warning, time period

159. Under Paragraph 7 of the Recommendation, "the employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if *repeated* on one or more occasions, unless the employer has given the worker *appropriate written warning*". Under Paragraph 10 of the Recommendation, "the employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a *reasonable period* of time after he has knowledge of the misconduct".

[18] For example: *Austria, Cyprus, Finland, Iraq, Tunisia.*

[19] For example: *Austria, Cyprus, Mauritius.*

[20] For example: *France*: in fact this role is played by a staff delegate or a trade union delegate; *Tunisia*: a worker may be assisted by a worker of his own choosing or by a trade union representative and by lawyers (s. 37 of the framework collective agreement).

[21] *France*; *New Zealand*: s. 59 of the Employment Contracts Act, 1991: a worker may choose his adviser.

160. As regards misconduct, the requirement contained in Paragraph 7 of the Recommendation applies only to misconduct of a kind that under national law or practice would justify termination of employment only if repeated on one or more occasions. It is for national law and practice to determine which cases of misconduct would justify termination of employment after a single instance and which kinds of misconduct justify termination only if they are repeated. It is in the latter case that the requirement of a written warning is recommended.

161. Furthermore, under Paragraph 8 of the Recommendation, "the employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed".

162. The purpose of these provisions is to ensure that a worker is given the opportunity to improve his conduct or performance before the imposition of such a serious sanction as termination of employment.

163. In a number of countries, the applicable provisions stipulate that termination for certain kinds of misconduct is justifiable only if the misconduct is repeated,[22] and sometimes only if the employer has given a written warning to the worker.[23] They usually specify the time period beyond which the employer may no longer terminate the worker's employment.[24]

164. In some countries, the termination of a worker's employment for unsatisfactory performance is acceptable only if the latter has a disruptive effect at the workplace and after the worker has been given occupational training and a reasonable period for integration.[25] In one country, the employment of a worker may be terminated if he remains unskilled after receiving training or after transfer to another job.[26] The government of another country pointed out that in practice the employment of a worker would not be terminated for unsatisfactory performance unless he had received appropriate instructions and directives for the performance of his work.[27]

165. As regards the concept of "a reasonable period of time", it was pointed out during the preparatory work that this period of time would begin with knowledge of the instance of misconduct which justifies the termination of employment, that is, the last instance following warning in cases of repeated misconduct. Moreover, where investigation of the circumstances of the conduct is necessary, the time required for such an investigation would certainly come

[22] For example: *Brazil, Czech Republic, Dominica, New Zealand, Portugal.*

[23] For example: *Czech Republic*: s. 46 of the Labour Code.

[24] For example: *Portugal* (six months); *Iraq* (two weeks).

[25] For example: *Czech Republic* (two months); *France; Slovakia*. The situation is similar in *Portugal*.

[26] For example: *China.*

[27] *Finland.*

within the concept of a "reasonable period of time". [28] It may be assumed that if the employer allows a certain period of time to pass without reacting, the misconduct was not sufficiently serious to justify termination of employment, quite apart from the fact that the evidence is likely to disappear.

166. This point has been made explicit in legislative provisions on disciplinary procedures, although it is often the result of an examination of evidence on the justification of termination of employment by the competent appeals bodies. An inordinately long period of time between the termination of a worker's employment for misconduct and the time at which the employer became aware of it is often considered as proof that the misconduct was not sufficiently serious to be sanctioned by termination of employment or that the real reason was other than misconduct. It is often these bodies which decide, on a case-by-case basis and in the light of all the circumstances, what is or is not a reasonable period of time.

Consultation of workers' representatives

167. Paragraph 11 of the Recommendation states that "the employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment". The expression "workers' representatives" is understood within the meaning defined by the Workers' Representatives Convention, 1971 (No. 135). [29]

168. In a number of countries, workers' representatives are called upon to play a role in the termination of the employment of individual workers, sometimes through their prior consultation or agreement. In some countries, the employer is required to notify and consult the workers' representatives. [30] In other countries, the employment of a worker may be terminated for certain reasons only if the trade union has been given prior notification or with its consent. The reasons for which consent is required vary from one country to another and are determined by legislation and collective agreement. [31] Some legislation makes provision for preventive procedures before termination of employment, for example, in the case of trade union representatives or officials,

[28] ILC, 67th Session, 1981, Report VIII(2), pp. 46 and 53; idem, *Record of Proceedings*, p. 33/19.

[29] ILC, 68th Session, 1982, *Provisional Record*, p. 30/15. See also above, para. 112, note 49.

[30] For example: in *Austria* and *Germany*, works councils must be consulted before termination of employment. In both countries, they may raise objections to the termination of employment; in *Germany*, the works council thereafter plays no part in any resulting legal proceedings. In contrast, in *Austria* the works council may take legal action, and the employee may only take such action if the works council fails to act; if the works council accepts the dismissal, the employee is only entitled to have recourse to the courts in limited cases; *Portugal* (termination of employment for a valid reason or lack of capacity); *Sweden* (when the employee is a member of a union).

[31] For example: *Belarus, Russian Federation*.

members of works councils, or occupational safety and health representatives, whose termination of employment may be subject to authorization by a trade union body or the works council. [32]

169. The need to obtain the prior approval of the workers' representatives may be an effective means of preventing the employment of workers from being terminated without a valid reason. However, if the employment of a worker is terminated, he should retain the right to appeal against the termination before the appeal bodies.

Written notification of termination of employment

170. Paragraph 12 of the Recommendation states that "the employer should notify a worker in writing of a decision to terminate his employment".

171. In order for an immediate termination of employment to take effect or for a period of notice to begin, it is indispensable for the employer to notify the worker in question of his decision to terminate his employment. Although no formality is required in some countries, [33] many others make it compulsory for the employer to notify the worker in writing in the case of termination of employment with or without notice. [34] The time-limits for notification may vary in the event of termination of employment for misconduct according to the seriousness of the misconduct. [35] Legislation sometimes provides explicitly that the written notification must indicate the date on which the employment relationship will end, a requirement which would in any case appear to be implied in the employer's obligation to inform the worker of his intention to terminate his employment. [36] In several countries, the period of notice commences from the date of the actual notification of termination of employment. [37]

Written statement of the reason or reasons for the termination

172. Paragraph 13(1) of the Recommendation states that "a worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination". This provision, considered as a fundamental principle by several governments during the second

[32] For example: *Bulgaria, Finland, Lithuania, Russian Federation*. For the required authorization by a public body, see above, Ch. III, para. 82.

[33] For example: *Germany* (except in the case of the termination of an employment-cum-training relationship and the articles of engagement of seafarers).

[34] For example: *Benin, Cameroon, Colombia, Cuba, Czech Republic, France, Iraq, Italy, Luxembourg, Peru, Portugal, Romania, Spain, Sweden.*

[35] For example: *Spain*: s. 60(2) of the Workers' Charter.

[36] For example: *Spain*.

[37] For example: *Benin, Cameroon, France*.

discussion at the Conference, given the importance for the worker of knowing the reason for the termination of the employment relationship in any system of protection against unjustified termination, was transferred from the proposed Convention to the proposed Recommendation with a view to making the Convention more flexible.[38]

173. Subparagraph (2) of Paragraph 13 of the Recommendation states that subparagraph (1) need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Convention, if the procedures provided for in those Articles are followed.

174. In a number of countries, the employer is required to give reasons for the termination of employment[39] or to inform the worker, on request, of the reasons for the termination,[40] and the request and reply must be sent by registered letter; in other countries, the employer is required to provide such a statement without the worker having to request it.[41] Sometimes the notification of reasons is obligatory in the event of dismissal for economic reasons.[42]

II. Procedures of appeal against termination of employment

175. The right of appeal is an essential element of a worker's protection against unjustified termination of employment. Articles 8 and 9 of the Convention deal with the principle of this right, the competent body to examine the appeal, its powers and the burden of proof. Article 10 envisages measures of compensation in the event of unjustified termination of employment. Paragraphs 14 and 15 of the Recommendation refer to the desirability of establishing a procedure of conciliation and the efforts that should be made to ensure that workers are informed of the possibility of appeal at their disposal.

The principle of the right of appeal — Impartial body — time-limit

176. Article 8, paragraph 1, of the Convention provides that "a worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator". Under Article 8,

[38] ILC, 68th Session, 1982, *Provisional Record*, p. 30/8.

[39] For example: *France, Peru, Portugal, Romania, San Marino, Senegal.*

[40] For example: *Finland; Luxembourg*: within one month from the notification of termination of employment, a worker may request a statement of reasons, and the employer is required to give a precise statement of such reasons; *New Zealand.*

[41] For example: *Benin, Cameroon, Colombia, Czech Republic* (in this country, failure to provide sufficiently clear reasons renders the notification of the period of notice null and void), *Ethiopia, Mexico, Peru, Spain.*

[42] For example: *Finland, France.*

paragraph 2, "where termination has been authorized by a competent authority, the application of paragraph 1 of the Article may be varied according to national law and practice". Under Article 8, paragraph 3, "a worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination".

177. The Convention embodies the principle of a worker's right to appeal, which of course does not prevent the worker from entrusting the exercise of his right to a third party, such as a trade union.[43] However, provisions which in some circumstances exclude this right of appeal would not be consistent with the Convention.[44] The Committee noted in a previous General Survey that the possibility for an alleged victim of discrimination to be represented by a trade union, together with "class actions"[45] or actions brought on their own initiative by the authorities in the public interest, the application of legislation with respect to equality being considered a matter of public interest, may be an additional means of applying the policy of equality of opportunity and treatment.[46]

178. Furthermore, the Convention embodies the principle whereby the body to which the appeal is made must be impartial. This means, for example, that a hierarchical administrative appeal procedure cannot be considered as the appropriate form of appeal under the provisions of the Convention: where such a procedure exists, provision must be made for a subsequent appeal to an impartial body. The Convention mentions the following as constituting such a body: a court, labour tribunal, arbitration committee or arbitrator. The choice of competent body or bodies is therefore left to each country, provided that such bodies are impartial.

179. Article 8, paragraph 2, of the Convention allows the application of paragraph 1 (i.e. the exercise of the right of appeal) to be varied according to national law and practice where the termination has been authorized by a competent body: it does not permit the right itself to be impaired. Clearly then, in every case the worker must have the right to appeal against the termination of his employment before an impartial body.

180. Article 8, paragraph 3, allows countries to provide for a time-limit for filing an appeal. It is worded in such a way as to take account of the many national systems which restrict the period of time for lodging an appeal, with the word "may" indicating that each country has the latitude to choose whether or not to impose such a time-limit.[47]

[43] For example: in *Spain*, trade unions may take legal proceedings on behalf of their members, provided that the worker does not object.

[44] For example: *Austria*: a worker may not appeal against a termination of employment which has been explicitly approved by the works council.

[45] *India, United States*: (Class action or representative action).

[46] *General Survey on equality in employment and occupation*, 1988, para. 222.

[47] ILC, 68th Session, Geneva, 1982, *Provisional Record*, p. 30/9.

181. Article 8, paragraph 1, reflects the variety of appeals procedures available in different countries and also within each country. The powers of these *bodies* are in fact determined by the provisions applicable to the worker or invoked by the latter and, within the same country, the body may vary according to different criteria, for example, the category of worker (private or public sector), the type of termination of employment (with or without notice; with or without prior authorization), the provisions invoked (labour law, civil law, basic rights, in particular as regards non-discrimination, [48] rights resulting from a collective agreement). [49]

182. The development of labour law has been accompanied by the establishment of procedures for the settlement of specific disputes which are entrusted to specific bodies. The establishment of such bodies reflects, in particular, a desire to provide a less formal and quicker procedure which is sometimes available free of charge for the settlement of labour disputes in general and those relating to termination of employment in particular. [50] Thus, in many countries a worker may appeal to an impartial body which is specialized in appeals concerning labour law, such as a labour tribunal or an industrial relations tribunal [51] or an arbitration committee or arbitrator. [52] These bodies are made up of either a judge and representatives of employers and workers [53] or only representatives of employers or workers. [54] In other countries, it is generally the ordinary courts which are competent to hear appeals against unjustified termination of employment. [55]

183. In the case of countries in which the provisions or practice do not require justification in all cases of termination of employment, the situation

[48] In the above General Survey, the Committee mentioned the variety of appeals procedures available in the event of discrimination in employment, paras. 216-223.

[49] For example: *France*: the same problem, the dismissal of a trade union representative, may be handled by more than one legal body: the administrative judge, who rules on the legality of administrative authorizations of termination of employment issued by the labour inspectorate, the labour judge, who rules on requests for compensation made by trade union representatives if they are not reinstated after the cancellation of the administrative authorization; and even the criminal judge, who may be called upon to rule on an offence allegedly committed by the employer in not reinstating the trade union representative after the cancellation of the administrative authorization for termination of employment.

[50] For example: *France, Senegal.*

[51] For example: *Belgium, Botswana, Brazil, Cameroon, Central African Republic, Chile, Dominican Republic, France, Gabon, Germany, Grenada, Guinea, India* (state legislation), *Mali, Mauritius, Namibia, New Zealand, Pakistan, Poland, Portugal, San Marino, Senegal, Sri Lanka, Suriname, Swaziland, United Kingdom, Zaire, Zimbabwe.*

[52] For example: *Lebanon, Mexico, Philippines.*

[53] For example: *Belgium* (*"échevinage"*), *Germany.*

[54] For example: *France* (industrial tribunal).

[55] For example: *Azerbaijan, Barbados, Belarus, Comoros, Croatia, Ethiopia, Iceland, Latvia, Russian Federation, Slovakia, Switzerland, United Arab Emirates.*

varies depending on whether the worker may invoke certain specific forms of protection, the clauses of a collective agreement or the principles of common law. [56]

184. Depending on the nature of the complaint or, where applicable, the compensation sought by the complainant, the latter may choose the appeal procedure he or she considers most appropriate to his or her case. [57] It should also be pointed out that specialized bodies may be assigned application and supervisory functions concerning protection against discrimination in employment and occupation, in order to ensure compliance with equality policies and principles, with special powers to receive complaints, undertake inquiries and attempt conciliation. They are sometimes authorized to take coercive measures and, in particular, to refer cases to the courts. [58]

185. In countries in which prior authorization is required before termination of employment, which is often the case for workers' representatives, an appeal may generally be made before an impartial body, which varies according to the authority issuing the authorization for termination of employment. As in many cases this is an administrative authority (for example,

[56] In the *United States*, which has not adopted general legislation against wrongful termination of employment, proceedings by employees based on common law concerning wrongful dismissal are brought before the courts. In the unionized sector, collective agreements (which generally stipulate that a worker may be dismissed only for just cause) establish arbitration procedures before private arbitrators (after internal grievance procedures), whose decision pursuant to the clauses of collective agreements is final. Although the arbitrators are not required to follow the decisions of other arbitrators, it would appear that a sort of common law in arbitration has developed, with arbitrators taking account of previous decisions. Furthermore, workers who are protected by the National Labor Relations Act may present a complaint to an administrative law judge and other appeals procedures are available for workers protected by other statutes. In *Canada*, the situation is similar as regards the unionized sector and jurisdictions in which common law continues to be applied. At the level of federal jurisdiction, as well as in the Provinces of Quebec and Nova Scotia, where legal provisions have extended the protection against unjustified dismissal to non-unionized workers, complaints based on these provisions are not heard by the courts, but by administrative bodies inspired by the unionized sector arbitration model.

In the *United Kingdom*, a country with a common law tradition which has introduced legislation on unfair dismissal, an appeal based on this legislation is referred to an industrial relations tribunal. However, unfair dismissal under common law continues to exist in law and may be useful in some circumstances for the employee, for example when he is unable to invoke the legal provisions governing termination of employment or when the prejudice suffered by the worker in terms of wages or other lost benefits exceeds the maximum amount allowed under legal provisions. These appeals may be lodged with the ordinary courts.

[57] In *Ireland*, the complainant may apply first to a Rights Commissioner, then to the Employment Appeals Tribunal, or refer the case directly to the latter.

[58] For a detailed examination of the powers of these bodies, see the *General Survey on equality in employment and occupation* of 1988, paras. 213, 214 and 216. See also: "Enforcement of equality provisions for women workers", ILO, 1994, IDP Women/WP-20.

a labour inspector), the administrative courts are often the appeal body,[59] although the labour courts may also fulfil this function.[60]

186. Finally, it should be emphasized that a worker may generally, after the first instance, refer the dispute to the appeal bodies, in various forms and under various conditions, such as the appeal courts or even the supreme court.[61]

187. The right to appeal against a termination of employment that is considered unjustified must generally be exercised within a prescribed *time-limit*.[62] Such time-limits are imposed because of the difficulty of establishing proof of facts which are essential for a proper decision after a certain time has elapsed (in particular when testimony is required), and also because of the need for certainty with regard to the legality of past actions. However, such time-limits should be sufficiently long to allow the worker to be fully informed of his rights under the law, collective agreements and his contract, and to decide whether they have been violated and, if so, whether to appeal.

188. Short time-limits do not allow workers (in particular those who are not directly assisted by workers' representatives) to ascertain their rights in order to be able to decide on the basis of all the facts whether or not they should appeal. This is one of the reasons why some countries make it compulsory for the employer to inform the worker at the time of termination of employment of his right to appeal. In some countries, the courts may allow an appeal lodged after the time-limit has expired if the worker provides a valid reason for the late application.[63]

189. When the worker has appealed before an impartial body, it would be advisable that the length of the procedure be reasonable and the costs be minimal, so as not to dissuade the worker to claim his rights.

Conciliation

190. In accordance with Paragraph 14 of the Recommendation, provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment. Conciliation gives each party an opportunity to review, in the presence of a third party, the question of

[59] For example: *France*.

[60] For example: *Cameroon, Congo, Zaire*.

[61] For example: *Spain*: a worker may appeal to the Superior Court against a decision of a labour judge; he may file an appeal to the court of cassation (which does not concern facts of the case, unless there has been an error in the examination of evidence); or, in the case of a right guaranteed by the Constitution, he may file for protection (*amparo*) to the Constitutional Court.

[62] For example: *Azerbaijan*: one month, which may be extended by the court; *Belarus*: three months; *Chile*: 60 days; *Russian Federation*: one month; *Saudi Arabia*: 15 days; *United Kingdom*: three months.

[63] For example: *United Kingdom*: the courts may extend the time-limit if it was not reasonably possible for the plaintiff to bring an appeal within the time-limit.

justification of the termination of employment, in the light of applicable legal standards, and to assess the likelihood of winning or losing the case before the competent court and the possibility of reaching an agreed solution (which may involve the withdrawal of the complaint, reinstatement or agreement on compensation). This enables the number of cases to be heard by the competent bodies (such as referred to in Article 8(1) of the Convention) to be reduced.

191. Conciliation may take place before[64] or instead of[65] a contentious procedure. The conciliation procedure may be compulsory[66] or voluntary.[67] When preliminary conciliation is compulsory, it is sometimes supplemented by a conciliation procedure before a designated authority.[68] In one country, the attempt at conciliation is normally voluntary, but may be compulsory in certain specific cases, such as reductions in the workforce.[69]

192. The attempt at conciliation may also be a stage in the actual appeals procedure[70] (and in this case it is normally a compulsory stage in the process). In some countries, the preliminary procedure (whether voluntary or compulsory) and the procedure within the framework of the appeal itself may be applied cumulatively. For example, in *Italy*, conciliation is compulsory prior to the proceedings, in enterprises with less than 60 workers while it is voluntary within the framework of the appeal.[71]

193. In countries where termination of employment is still regulated to a large extent by collective agreements, such agreements normally include conciliation procedures.[72]

194. The body responsible for preliminary conciliation is often a labour inspector,[73] or some other administrative authority,[74] or a specialized body.[75]

195. Both conciliation and mediation procedures play an important role in the machinery for the application of anti-discriminatory provisions. The

[64] For example: *Ethiopia, Hungary*.

[65] For example: *New Zealand*: s. 44(5) of the Employment Contracts Act, 1991.

[66] For example: *Hungary, Indonesia, Senegal, Sri Lanka, Swaziland*.

[67] For example: *Mali, Poland*.

[68] For example: *New Zealand*. According to the comments of the New Zealand Council of Trade Unions, the complex and legalistic nature of procedures under the Employment Act makes redress longer, more formal, difficult and expensive.

[69] *Ethiopia*.

[70] For example: *Central African Republic, France, Germany*.

[71] *Italy*: s. 5 of Act No. 108 of 11 May 1990; s. 410 of the Code of Civil Procedure.

[72] For example: *Canada, United States*.

[73] For example: *Gabon, Mali, Senegal*.

[74] For example: *Bangladesh, Sri Lanka*.

[75] For example: *Mexico*.

competent conciliation bodies are sometimes required to promote the settlement of disputes arising out of cases of termination of employment on discriminatory grounds. [76]

Examination of the reasons for termination of employment — Burden of proof

196. Article 9, paragraph 1, of the Convention provides that the bodies referred to in Article 8 "shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified".

197. This provision establishes the essential principle of the right to appeal, under which it must be possible for the reasons and the other circumstances relating to the case to be examined by an impartial body, enabling it to decide on the justification of the termination. This paragraph, in a slightly different wording, was supported by the very large majority of governments from the beginning of the preparatory work.

198. As regards the burden of proof Article 9, paragraph 2, provides that "in order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities: (a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer; (b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice".

199. The success of an appeal against unjustified termination of employment depends to a large extent on the ability of the worker/complainant to convince the competent impartial body of the justification of his complaint, which in turn will depend mainly on the evidence submitted. In cases of termination of employment, the application of the general rule applicable in contract law, whereby the burden of proof rests on the complainant, could make it practically impossible for the worker to show that the termination was unjustified, particularly since proof of the real reasons is generally in the possession of the employer. This is all the more true if there is no clear statement of the reasons by the employer, which may well be the case when the employer is not required to provide written reasons for the termination of employment. In an employment relationship, it is the employer who has the upper hand, particularly because he controls the sources of information.

200. The Convention therefore lays down the principle in Article 9, paragraph 2, that the worker must not "have to bear alone the burden of proving

[76] For example: *United Kingdom* (Advisory Conciliation and Arbitration Service (ACAS)).

that the termination was not justified" [77] and proposes several possible methods of achieving this. Under the first of these (Article 9, paragraph 2(a)), the burden of proving the existence of a valid reason rests on the employer. This text clearly indicates that the employer is required to present evidence showing that there is a valid reason, as defined by Article 4 of the Convention. It is the responsibility of the impartial body to decide, in the light of the evidence presented, whether the termination is justified.

201. The second possibility (Article 9, paragraph 2(b)) consists of not placing the burden of proof on either the employer or the worker, but allowing the impartial body to reach a conclusion in the light of the evidence provided by the two parties. This implies that each party, in his own interest, will submit to the body the evidence at his disposal and which he considers as establishing his case, and that the body will use, where appropriate, any power of investigation accorded to it by national law and practice.

202. Finally, the third option is to provide for both of the above possibilities. The methods of implementation referred to in Article 1 must therefore include one or the other or both of these two possibilities.

203. The Convention therefore distances itself from the traditional concept of contract law, whereby the burden of proof is placed on the complainant. It is based in particular on the tradition of common law countries in which the employer was required to provide proof of the justification of termination of employment without notice for serious misconduct and on the concepts now current in other countries in civil proceedings in which the judge decides in the light of the evidence before him, mainly the evidence presented by the parties, thereby participating in the search for the truth, often with real powers of investigation. It is also linked to the principle whereby in labour disputes legal provisions must be interpreted in favour of the worker.

204. Many countries place the burden of proving the existence of a valid reason for termination of employment on the *employer*. [78] This is the case in some countries which stipulate that the burden must concern the reason given to justify the termination and all the relating circumstances with a view to establishing proof that the termination was reasonable. [79] The employer may be required to keep relevant documents in the enterprise to be used in evidence in the event of appeal. In the specific case in which reasons based on the operation of the enterprise are invoked, the body is sometimes empowered to carry out an inquiry.

205. Several States which refer to the principle of "wrongful dismissal" *(licenciements abusifs)* indirectly place the burden of proof on the employer by defining wrongful dismissal as termination of employment without legitimate

[77] The word "alone", introduced during the second discussion at the end of the proceedings (ILC, 68th Session, 1982, *Provisional Record*, p. 30/13), anticipates subpara. (b) of para. 2.

[78] For example: *India*.

[79] For example: *Australia, Germany, Italy, Peru*.

reason.[80] Under the legislation of these countries, dismissal is wrongful if the employer is unable to prove the existence of a legitimate reason for termination of employment[81] or the real and serious nature of the reason invoked.[82] In some countries, the burden of proof is placed on the employer only if a certain category of worker is involved: this is the case for example in *Belgium*, where the concept of wrongful dismissal applies only to wage-earners and not to salaried employees, who must justify any legal action that they take and produce the necessary evidence.

206. Some countries recognize a presumption in favour of a worker whose employment has been terminated, which the employer must refute. For example, in *Cyprus*, in any court proceedings there is a presumption, unless there is proof to the contrary, that the employer has not terminated the employment of a worker for a valid reason. Sometimes, these presumptions are established for specific cases of discriminatory termination of employment. This is the case, for example, in *Argentina*, for women workers whose employment is terminated for reasons of maternity or marriage. In *Italy*, when the complainant provides proof (including statistical proof on practices with regard to termination of employment) which specifically and systematically justifies the presumption of discrimination based on sex, the burden of proof rests with the employer to refute this presumption. Furthermore, as regards anti-union discrimination, the legislation of several countries has strengthened workers' protection by requiring the employer to prove that the allegedly anti-union measure was based on reasons other than trade union activities;[83] some texts expressly establish a presumption in favour of workers.[84]

207. Since it is difficult for a worker who is the victim of discrimination (irrespective of whether the discrimination is anti-union or on other grounds) to prove that he has been the victim of such discrimination, the Committee considers that legislation and practice should contain measures to remedy these difficulties; the methods mentioned above could contribute in this respect.

208. In one country in which industrial relations are based mainly on collective agreements, legal provisions have sometimes been adopted to fill

[80] For example: *Madagascar*: s. 37 of the Labour Code, 1975.

[81] For example: *Burkina Faso*: s. 33 of the Labour Code of 1992; *Mali*: s. L.51 of the Labour Code of 1992.

[82] For example: *Gabon*.

[83] For example: *Finland*: when a worker alleges that he has been dismissed for trade union activities, s. 37(2) of the Contracts of Employment Act stipulates that the employer must prove that he had sufficiently serious reasons for dismissing the worker; *Hungary*, s. 5(2) of the Labour Code, 1992; *Barbados*: in accordance with custom and practice, the burden of proof rests on the employer.

[84] For example: *Canada* (Quebec): s. 17 of the Labour Code.

possible gaps in collective agreements. Unless an agreement provides for the contrary, these provisions place the burden of proof on the employer. [85]

209. Some reasons may serve as criteria for reversing the burden of proof and transferring it to the employer. This may be the case, for example, with allegations of serious misconduct, given the negative consequences which such misconduct, if proven, would have for the worker, such as the loss of entitlement to a severance allowance.

210. Some countries have abandoned procedures which place the burden of proof on the complainant, but do not impose it on the employer either. Instead, they have adopted the alternative solution envisaged in Article 9, paragraph 2(b), of the Convention and *do not impose the burden of proof on either party*. In accordance with this solution, the parties each provide the competent body with the necessary facts to enable it to render a decision. Article 9, paragraph 2(b), specifies that the bodies shall be empowered to reach a conclusion "according to procedures provided for by national law and practice". In some cases, it may be laid down that, in order to reach its conclusion, the body may collect further information (other than that submitted by the parties) using all means of investigation considered appropriate. For example, in the *Philippines*, the competent bodies may resort to all reasonable means to allow them to rapidly and objectively ascertain the facts in each case. In *Tunisia*, the body, in this case the judge, can have recourse to all the means of investigation he deems necessary. [86]

211. A problem may arise if the judge cannot reach a conclusion on the basis of the evidence, or following an inquiry, and if a doubt remains. In a number of countries, it is considered that where a doubt subsists the burden of proof should rest on the employer. In fact, as termination of employment is unjustified unless there is a valid reason, if it is impossible for the judge to ascertain that there is such a reason then the logical conclusion is to recognize that the conditions for such justification, and therefore the right to termination of employment, do not exist. [87]

212. Some countries have not established any specific rules with regard to the burden of proof, which rests on the *complainant*, namely the dismissed worker. [88]

213. With regard to termination of employment for reasons *based on the operational requirements of the undertaking, establishment or service*, Article 9,

[85] For example: *Canada*: Canada Labour Code, Part III.

[86] Act No. 94-29 of 21 Feb. 1994, amending the Labour Code; this is also the case in *France*.

[87] For example: in *France*: according to s. L.122-14-3 of the Labour Code, if a doubt does remain, it is to the benefit of the worker.

[88] For example: *Switzerland*: a worker who believes that his contract of employment has been terminated wrongfully (*abusif*), can bring action against the employer before the civil courts. The worker has to prove that the termination was wrongful.

paragraph 3, of the Convention specifies that the bodies referred to in Article 8 "shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1".

214. From the outset of the preparatory work, it was considered that it would be best to leave each country to determine the question whether the bodies to which dismissals may be appealed should be authorized to review the sufficiency of reasons related to the operational requirements of the undertaking.[89] This provision therefore affords a certain amount of flexibility by allowing each member State to determine to what extent the competent bodies should be authorized to review the employer's judgement as to the sufficiency of reasons based on operational requirements. Where workforce reductions are concerned, the employer must therefore clearly have a valid reason within the meaning of Article 4 of the Convention. But it is left to each country to determine the extent to which the impartial bodies before which appeals may be brought against termination of employment should be empowered to review the employer's judgement as to operational requirements, that is, the extent to which they are to be empowered to decide whether these reasons, which are valid by their nature, are sufficiently important to justify the termination of employment. The text therefore allows each country to restrict the power of the competent body, when investigating whether termination of employment was justified, to review the employer's judgement in relation to workforce numbers.

215. The idea put forward by some governments that the justification for termination of employment based on operational requirements should be examined by the competent bodies before the termination was not retained. However, a State may institute such a system if it considers it to be appropriate.[90]

216. In some countries, examination of the justification for an economic reason is not the responsibility of the appeal body. This is the situation, for example, in *Bulgaria*. The Bulgarian Government stated that a decision to reduce the volume of work, which may bring about a reduction in the number of workers, is not subject to legal review.

217. In other countries, however, the judge is empowered to investigate the validity of the reason based on the economic requirements of the undertaking. For example, in *Cameroon*, if the reason (or the order of terminations of employment) is contested, the burden of proof rests on the employer. Likewise in *Italy*, it is the employer who is responsible for providing

[89] ILC, 67th Session, 1981, Report VIII(1), p. 28; Report VIII(2), p. 72; Report V(2), ILC, 68th Session, 1982, p. 35. During the preparatory work, it was also pointed out that the proposed text opened up the possibility that certain appeal bodies would not be empowered to decide whether the reasons connected with the operational requirements of the undertaking were sufficient to justify termination of employment. ILC, 67th Session, 1981, *Record of Proceedings*, p. 33/12.

[90] ILC, 67th Session, 1981, Report VIII(2), p. 72.

proof of the existence of reasons to justify the predominance or overriding importance of production technology requirements. In the *Russian Federation,* in the event of enterprise closure or workforce reduction, the courts decide whether employment was in fact terminated for the reasons given.

Remedies: Reinstatement and/or compensation

218. Under Article 10 of the Convention, "if the bodies referred to in Article 8 ... find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate".

219. The wording of Article 10 gives preference to declaring the termination invalid and reinstating the worker as remedies in the case of unjustified termination of employment. However, it is flexible in that it offers other possible remedies, depending on the powers of the impartial body and the practicability of a decision to nullify the termination and reinstate the worker.[91] The text specifies, moreover, that when compensation is paid it should be "adequate".

220. This compensation differs from the compensation in lieu of notice mentioned in Article 11 and from the severance allowance provided for in Article 12.[92]

221. While *financial compensation* compensates for the unjustified loss of employment, *annulment* of the termination and *reinstatement* guarantee job security by allowing the worker to take up his job again, and offering him the possibility of retaining the rights he has acquired during his years of service, such as entitlement to old-age benefits; they often also entail the payment of outstanding wages. Reinstatement can also involve the implementation of special protection for certain groups of workers, such as workers' representatives, workers who are members of trade unions, and workers whose employment has been terminated for discriminatory reasons.[93] During times of unemployment, reinstatement can also play a decisive role, in particular for groups who are disadvantaged on the labour market such as women, old workers and persons with disabilities. The effectiveness of the protection afforded by reinstating the worker depends in particular on the length of proceedings (too long a period between termination of employment and the final decision is not favourable for reinstatement); on the specific nature of the employment relationship (reinstatement is more feasible in a larger undertaking than in a smaller one where personal ties are closer between employer and worker); on the effectiveness of the machinery to enforce reinstatement decisions, which could

[91] ILC, 68th Session, 1982, *Record of Proceedings,* p. 30/10.

[92] See Chs. V and VI below.

[93] See below, paras. 231-232.

consist for example of penalty clauses making employers liable for damages if they fail to comply with the decision of the impartial body.

222. When reinstatement is ordered, the worker generally also has the right to the remuneration that he would have received between the date of termination of employment and the date of the decision, or of the actual reinstatement. Sometimes a deduction is made from this amount of a sum corresponding to any wages the worker may have received in the meantime if he has been able to find alternative employment. The competent bodies may frequently also provide that the employment relationship shall be considered to be uninterrupted, enabling the worker to retain his acquired rights, such as pension entitlements and qualifying periods for various purposes. For example, in countries where protective legislation against unjustified termination of employment requires a qualifying period, if a new qualifying period commenced from the date of reinstatement, the worker would not be protected against unjustified termination of employment immediately following his reinstatement, thus rendering the protective provisions illusory.

223. In most countries, the solutions adopted which give preference to one or the other of these remedies are not hard and fast. In certain countries, they may depend on the provisions relied upon and therefore on the form of appeal chosen[94] and the category of the complainant, for example, workers' representatives.

224. Some countries attach importance to the wishes of the parties. These countries establish reinstatement as a basic rule, which may be waived if one or both of the parties are opposed to it.[95] Sometimes the body may only order or propose reinstatement at the worker's request or if the parties have jointly decided upon this course of action.[96] This alternative may moreover call for certain specific conditions to be met for the competent body to be authorized to award compensation, such as evidence to suggest that reinstatement would not prove successful.

225. In some countries, the question of the remedy to be adopted is governed by various systems at the same time. For example, in *Peru*, under Act No. 24,514, the judge must order reinstatement, which cannot be replaced by financial compensation, whilst Legislative Decree No. 728 offers the worker the choice between reinstatement and payment of compensation. However, the judge is empowered to decide whether the choice of reinstatement is inappropriate, in which case he may replace reinstatement by compensation.[97] In *Colombia,*

[94] For example: in *India,* the civil courts can only award compensation, while the labour tribunals can order reinstatement.

[95] For example: *Burkina Faso, Germany.*

[96] For example: *Mexico.*

[97] Act No. 24,514 of 1986; Legislative Decree No. 728 of 1991; Act No. 24,514 continues to apply to workers who had achieved "employment stability" when Legislative Decree No. 728 came into force (in Dec. 1991).

since 1990, only financial compensation can be granted to workers who have less than ten years' service. Previously, the choice was left to the judge's discretion.[98] Finally, the employer may sometimes be empowered to refuse reinstatement, choosing instead to pay compensation.[99] In other countries, it is the competent body which can decide to award both reinstatement and financial compensation simultaneously,[100] although restrictions sometimes apply to certain types of employment contract.[101] In one country in which the law is based on the principle of the freedom of the employer to terminate the employment relationship which can be ended without having to follow any particular procedures or without a valid reason, the worker who is the victim of abusive termination of employment cannot seek the annulment of the termination but is entitled only to financial compensation.[102]

226. The *criteria* on which the choice between reinstatement and financial compensation is based vary widely. The decision may be based on criteria laid down in legislation, which sometimes contains a list of cases in which reinstatement can be ordered or proposed, or lists the cases in which it is considered that the reinstatement of the dismissed worker is not feasible,[103] and which sometimes also makes general provision for cases in which reinstatement would not be appropriate.[104] In other countries, the criteria may be established by way of collective agreement.[105]

[98] Legislative Decree No. 2351 of 1965 continues to apply to workers who had at least ten years' service when Legislative Decree No. 5 of 1990 was adopted.

[99] For example: *Equatorial Guinea*: s. 81(82) of Act No. 2/1990; *Venezuela*; *Italy*: Act No. 108 of 11 May 1990 (where the employer employs fewer than a certain number of workers, he may choose between reinstatement and payment of compensation).

[100] For example: *Namibia*: s. 46 of the Labour Act of 1992; ss. 52 and 13 of Legislative Decree No. 641/89; *New Zealand*: s. 40 of the Employment Contracts Act.

[101] For example: *Portugal*: Legislative Decrees Nos. 64/89 and 235/92: contracts for a trial period, domestic work.

[102] *Switzerland*.

[103] For example: *Botswana*: s. 24 of the Trade Disputes (Amendment) Act 1992; *Mexico*: s. 49 of the Federal Labour Act: domestic workers, length of service of less than one year, workers in positions of trust.

[104] For example: *Mexico*, ibid.

[105] For example: in *Belgium*, where collective agreements often include clauses relating to job security, the agreement on the department store sector provides the possibility of reinstating dismissed workers, provided that the labour court has not confirmed serious misconduct as being the reason for termination of employment.

227. The choice is sometimes left to the impartial body, which must then establish the criteria on which to base its choice. [106]

228. The length of time between the filing of the complaint and the final decision sometimes decisively influences the impartial body's choice between reinstatement and compensation. [107]

229. In the case of *financial compensation,* the *amount* has to be determined. Legislation often specifies the amount of compensation or the extent of damages to be awarded on the basis of one or several factors, such as the nature of the employment, [108] length of service, [109] age, [110] acquired rights [111] or the circumstances of the particular case, namely the reason for termination of employment, [112] the possibility of finding a job, career prospects, or the personal circumstances of the worker, such as his family status, [113] or of the employer, such as the size or nature of the undertaking. [114] Some countries make provision for compensation not only for financial detriment suffered, but also for moral damage. [115] In a number of countries, the legislation sets the amount of compensation, which is generally either a specified sum or may be influenced by various factors. [116] In some countries, the legislation sets a minimum [117] or a maximum amount [118] of compensation. In others, it provides for a supplement in certain cases, in

[106] For example: *United Kingdom*: the main criteria seem to be the following: reasons for the termination of employment, objective and subjective reasons, the worker's and the employer's attitude, length of the appeal proceedings, size of the undertaking. For the period 1990-91, the courts only decided upon the reinstatement of dismissed workers in 2 per cent of termination cases; "The 1992 survey on industrial tribunal applications" in *Employment Gazette*, Jan. 1994; *New Zealand; Republic of Korea*.

[107] In *India*, the Supreme Court has sometimes concluded that substantial and adequate compensation would be more acceptable to the parties than reinstatement with the payment of outstanding wages, if it is some time since the worker lost his job.

[108] For example: *Burkina Faso*: s. 34 of the Labour Code; *Mali*: s. 51 of the Labour Code.

[109] For example: *India, Mali, Thailand.*

[110] For example: *Equatorial Guinea*: s. 81 of the Labour Code; *India; Mali; Thailand.*

[111] For example: *Mali.*

[112] For example: *Thailand.*

[113] For example: *Madagascar.*

[114] For example: *Egypt.*

[115] For example: *Canada, New Zealand, United Kingdom.*

[116] For example: *Peru:* according to the length of service, compensation equivalent to three to 12 months' wages and, in addition, the wages due from the time of the filing of the appeal up until the date of the final decision; *Colombia:* depending on the length of service, 45 to 80 days' wages, as well as the wages due for the duration of the procedure.

[117] For example: *France*: minimum of six months' wages, s. L.122-14-4 of the Labour Code.

[118] *Switzerland*: maximum of six months' wages, s. 336a CO.

particular if the reason for the termination was the worker's trade union membership [119] or if it was for discriminatory reasons. [120] When the body is free to set the amount, it plays an important role in determining the criteria to be taken into consideration, [121] including, for example, whether or not to take moral damage into account. [122]

230. Some countries also award damages, as distinct from compensation, in the event of unjustified termination of employment, when an employer is found to have acted in a wanton, reckless, malicious or sufficiently outrageous manner. [123]

231. Both in countries where financial compensation is offered as the sole remedy and in those where legislation or practice allows a certain amount of flexibility between compensation and reinstatement, terminations of employment based on one or several of the invalid reasons listed in Article 5 of the Convention, and in particular those based on discriminatory grounds, are considered in some countries as null and void since they impair a basic human right, and can entail the worker's reinstatement. [124] The application of the principle of reinstatement in the event of the nullity of the termination of employment is particularly important in the case of staff representatives, and some appeal bodies have affirmed this principle in recent years and have favoured reinstatement as the penalty for wrongful dismissal, and thus for the nullity of the termination of employment. [125] However, nullity of the

[119] For example: *Ecuador*.

[120] For example: *United Kingdom*: applies also to cases of racial discrimination since autumn 1994; *Canada*.

[121] For example: *New Zealand; United Kingdom*.

[122] For example: *Kuwait*: s. 231 of the Code of Civil Law of 1980; *United States*.

[123] For example: *Central African Republic*: s. 47 of the Labour Code; *France; Gabon; United States*.

[124] This is the case for example in the *Dominican Republic*: s. 391 of the Labour Code: the dismissal of a worker covered by trade union immunity ("fuero sindical") is null and void. Such termination requires the prior authorization of the labour tribunal. In *France*, in accordance with ss. L.122-45 of the Labour Code, the worker may not have his employment terminated on the grounds of his origin, sex, customs, family situation, membership of an ethnic group, nation or race, his political opinions, trade union or mutual fund activities, religious convictions or, unless incapacity is declared by the works' doctor, on the basis of the worker's state of health or disability, or for the normal exercise of the right to strike. All contrary acts in respect of the worker are legally invalid. Under case-law, the employer is prohibited, under sanction of nullity, from discriminating within the meaning of the above-mentioned section (*Cass. Soc.*, 15 May 1991); *Italy*: termination is null and void if it is based on discriminatory grounds or where there is a procedural defect; however, the consequences of these two forms of nullity differ.

[125] For example: *France: Cass. Soc.*, 17 Mar. 1993; 2 June 1993; 27 Oct. 1993.

termination of employment can also apply in the case of an ordinary worker if a fundamental right is at stake, and can entail the worker's reinstatement. [126]

232. In the light of the above, the Committee considers that compensation, in the case of termination of employment impairing a basic right, should be aimed at compensating fully, both in financial and in occupational terms, the prejudice suffered by the worker, the best solution generally being reinstatement of the worker in his job with payment of unpaid wages and maintenance of acquired rights. In order to do this, the impartial bodies should have all the necessary powers to decide quickly, completely and in full independence, and in particular to decide on the most appropriate form of redress in the light of the circumstances, including the possibility of reinstatement. When reinstatement is not provided as a form of redress, when it is not possible or not desired by the worker, it would be desirable for the compensation awarded for termination of employment for a reason which impairs a fundamental human right to be commensurate with the prejudice suffered, and higher than for other kinds of termination. The Committee notes in this respect that in one country the upper limit on compensation that can be awarded in respect of sex or racial discrimination has been repealed and the courts are empowered to award interest on compensation. The removal of this limit on compensation resulted in a large number of appeals being filed, in particular by women who had had their employment terminated in certain public services as a result of pregnancy. Average compensation is rising and substantial compensation has been awarded by some courts. [127]

Information on possibilities of appeal

233. In accordance with Paragraph 15 of the Recommendation, "efforts should be made by public authorities, workers' representatives and organizations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal".

234. This provision constitutes an important element of the effective protection of the worker against termination of employment. A worker who has his employment terminated not only finds himself faced with a sometimes sudden loss or reduction of income and the resulting problems, but usually lacks the

[126] For example: *France:* the reinstatement of a striker who had his employment terminated for having exercised a public freedom can only be ruled out by the appeal body in the case of a worker's gross misconduct (misconduct characterized by the worker's intent to harm the employer or the undertaking) (*Cass. Soc.*, 26 Sep. 1990; 21 Feb. 1991).

[127] *United Kingdom*: the Sex Discrimination and Equal Pay (Remedies) Regulations of 22 Nov. 1993; the Race Relations (Remedies) Act of 3 July 1994 and the Race Relations (Interest on Awards) Regulations of 1 Aug. 1994. The adoption of the Regulations of 1993 follows the decision of the Court of Justice of the European Communities in the Marshall case (No. 2) of Aug. 1993. Average compensation has risen by 45 per cent. Compensation in the case of women who have had their employment terminated in the public service as a result of pregnancy amounted to some £35,000, the sums varying between £800 and £299,000. The total amount of compensation granted for discrimination was over £1 million in 1993.

necessary knowledge of his rights and how to defend them: possibilities of appeal, time-limits, likely duration and cost of legal proceedings, precedents that could suggest a favourable outcome to an appeal, chances of reinstatement, amount of financial compensation. These are all questions which individual workers are poorly equipped to answer. This information is all the more necessary in that labour law in general, and legislation on termination of employment in particular, are becoming increasingly complex in terms both of substance and procedure, and the number of cases being handled is growing.

235. Public authorities can provide general information on the subject through the media, and in particular by publishing popular brochures on laws and practices with regard to termination of employment and the means of appeal which may be available, focusing particularly on workers' rights.

236. A number of governments gave information on their efforts to inform workers of their rights.[128] The activities mentioned include seminars,[129] workers' publications[130] and brochures,[131] sometimes presented in a simple but informative text with illustrations.[132] One government referred to a telephone hotline providing free information.[133]

237. Workers' representatives and organizations of workers have a fundamental role to play in informing workers, both at the time of the preliminary interview with the employer and, in general, on appeal possibilities. In particular, they can inform the worker as to whether they are entitled and whether they are available to represent or assist him in appeal proceedings.

[128] For example: *Botswana, Canada (Province of Quebec), Dominican Republic, Ethiopia, Ireland, New Zealand, Sweden, United Kingdom.*

[129] For example: *Botswana, Ethiopia.*

[130] For example: *Canada (Province of Quebec), Ireland, New Zealand.*

[131] For example: *Sweden.*

[132] For example: *Dominican Republic.*

[133] *New Zealand.*

CHAPTER V

Period of notice and certificate of employment

Period of notice

238. Under Article 11 of the Convention, "a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period".

239. The purpose of imposing this obligation on an employer intending to dispense with a worker's services is to prevent the latter from being taken by surprise by immediate termination of employment and to mitigate its detrimental consequences. Given warning, the worker is able to prepare himself to adapt to the situation and look for a new job. The contract of employment is maintained during the period of notice and each party must therefore discharge its obligations.

240. The need for a period of notice under Article 11 of the Convention is independent of the requirement of a valid reason for termination of employment. The fact that notice is duly given does not justify the termination of employment if it is not based on a valid reason and, conversely, the existence of a valid reason for termination of employment cannot relieve the employer of the obligation to give notice, unless the worker is guilty of serious misconduct. The compensation in lieu of notice provided for in Article 11 does not replace any compensation for unjustified dismissal (failing reinstatement of the worker) under Article 10 of the Convention. Nor should it be confused with the severance allowance referred to in Article 12 of the Convention.

241. In the great majority of countries, a period of notice is required in one way or another by national methods of implementation. Of all the rights enjoyed by workers in connection with termination of employment, the right to a period of notice is the most widespread. In countries where no reason is required for termination of employment, the right to a period of notice is the main form of protection afforded to the worker when employment is terminated. It is most often guaranteed by legislation, but provision is also made for it in collective agreements.

242. In many countries where a period of notice is required in order to terminate a contract of employment, this requirement only applies to contracts of indeterminate duration; contracts for a specified period or task are generally

considered to come to an end once the stipulated period of employment expires or the task is completed. In some countries, a copy of the notice must be communicated to the authorities before certain workers are dismissed, [1] and the period is sometimes longer in the case of collective dismissals. [2]

Length of notice period

243. Under the terms of the Convention, the period of notice must be of "reasonable" duration. In reply to a government's proposal to specify the length of the notice period in the instrument on the basis of the worker's length of service or skills, it was considered preferable to leave this to the discretion of each State. [3] In the event of dispute, it would be for the supervisory bodies to determine whether the duration is "reasonable". The provisions relating to the period of notice vary greatly from one country to another. In countries where contracts of employment are governed by legislative provisions, the latter also usually provide for a period of notice. The notice periods laid down by legislation are minimum periods which may be extended by collective agreement, [4] by the contract itself or by custom. In some cases, notice is only governed by legislation if it is not covered by collective agreement, or the law provides that in the absence of collective agreements the conditions and length of notice are determined by regulation or decree. [5]

244. The length of the notice period varies considerably from one country to another, and sometimes within the same country and from one occupation or sector of the economy to another. It may also differ depending on the type of contract, the pay period or the category of worker concerned. It often increases with length of service, which is often the main criterion for determining the

[1] For example: *Chile*: s. 162 of the Labour Code of 1994, in the case of termination of employment based on the requirements of the enterprise.

[2] For example: *Benin*: s. 9 of Act No. 90-004 of 15 May 1990, employees covered by a collective agreement, 21 days' notice; 60 days' notice in the case of termination of employment for economic reasons.

[3] ILC, 67th Session, 1981, Report VIII(2), p. 79.

[4] For example: *Germany*: s. 622(4) of the Civil Code.

[5] For example: *Cameroon*: s. 34 of the Labour Code of 1992: the conditions and length of notice are determined by ministerial order, after consultation with the National Consultative Labour Commission, taking account of the worker's length of service and occupational category; similar provisions exist in the *Central African Republic*: s. 43 of Act No. 61-221 to promulgate the Labour Code; *Côte d'Ivoire; Mali*: s. L.41 of the Labour Code, 1992.

length of the notice period, which increases in proportion to length of service. [6] Sometimes the worker's age is the criterion applied. [7]

245. In other countries, the period of notice varies according to the pay period. [8] A worker paid on a monthly basis is often entitled to between two weeks' and one month's notice, while a worker paid on a daily, weekly or fortnightly basis is given one to two weeks' notice. However, the periods may be longer. Sometimes they increase with length of service for workers paid at the same intervals. [9]

246. Different periods of notice are sometimes laid down depending on occupational category or grade, both for workers whose notice period is based on pay periods and for those for whom it varies according to length of service. [10] The period of notice may therefore be longer for salaried employees and highly skilled workers than for wage-earners, with additional increases in

[6] For example: *Australia*: s. 170 DB(2) of the Industrial Relations Act, 1988, as amended by the Industrial Relations Reform Act, 1993: one to four weeks; *Cambodia*: four days for up to three months' length of service; three months for over ten years' length of service; *Cyprus*: s. 9 of the Termination of Employment Act: notice varies between one week for 36 to 52 weeks' service and six weeks for at least 208 weeks' service; *Equatorial Guinea*: one week after one month, one month after six months; *France*: s. L.122-6 of the Labour Code: one month for six months' to two years' service; two months for over two years' service; without prejudice to more favourable provisions in the contract of employment, collective agreement or custom; *Hungary*: s. 92 of Act No. 22 of 1992 to promulgate the Labour Code: 30 days minimum; one year maximum; the 30-day period is extended in proportion to length of service: such extension varies from five days after three years' service to 60 days after 20 years' service; *Iceland*: s.1 of the Notice of Dismissal Act of 1979: one to three months; *Luxembourg*: s. 20 of the Act on employment contracts: two to six months; *Poland*: s. 35 of the Labour Code.

[7] For example: *Sweden*: s. 11 of the Security of Employment Act of 1982: two to six months' notice from the age of 25 to 45 years, after six months of service preceding the notice, or 12 months of service during the last two years.

[8] For example: *Bangladesh*: s. 19 of Act No. VIII of 1965, as amended in 1985: 120 days for permanent employees paid on a monthly basis; 60 days if they are paid on another basis; *Brazil*: s. 487 of the Consolidation of Labour Laws: eight days for workers paid on a weekly or monthly basis or those with over 12 months' service; *Kuwait*: s. 53 of the Employment Law of 1964: 15 days for workers paid on a monthly basis, otherwise one week; *Mauritius*: s. 31 of the Labour Act, No. 50 of 1975: three months for three years' continuous service, 14 days for workers paid at 14-day intervals, notice period equal to pay intervals of less than 14 days. Specific notice periods exist for certain categories of workers, such as agricultural and construction workers; *Niger*: interoccupational collective agreement dated 15 Dec. 1972: one month for workers paid on a monthly basis, eight days for others.

[9] For example: *Qatar*: Act No. 3 of 1962: for workers paid on a yearly or monthly basis, one month's notice for up to five years' service and two months' notice for more; for workers paid on another basis, one week to one month's notice depending on length of service.

[10] For example: *Cameroon*: s. 34 of the Labour Code of 1992; *Côte d'Ivoire*: s. 1 of Decree No. 80-107 of 21 June 1980: the notice period varies according to whether the workers are paid by the hour, week or month; for the latter, it depends on the category of worker; *Mali*: s. L.41 of the Labour Code: notice varies according to length of service and is increased for foremen and assimilated persons and for managerial and executive staff.

proportion to length of service for each category, or it may vary according to remuneration. [11] In one country, the distinction between wage-earners and salaried employees was recently abolished. [12] In another country a collective agreement in the metal/mining/energy sector included notice periods for wage-earners similar to the statutory period of notice for salaried employees. [13] In other countries, however, the duration of notice cannot be shorter than a fixed period which is the same for all workers. [14] In some cases, the notice period does not include certain periods during which the contract is suspended. [15]

Compensation in lieu of notice

247. Under Article 11 of the Convention, a worker is entitled to a period of notice or compensation in lieu thereof. The purpose of the period of notice is to mitigate the consequences of termination of employment, and in particular to prevent the worker from abruptly being without a livelihood if the employer fails to observe the period of notice; the worker must therefore be entitled to compensation in lieu of notice. Such compensation should correspond to the remuneration the worker would have received during the period of notice if it had been observed.

248. In most of the countries where a period of notice is required, legislation or case-law provides for the payment of compensation in lieu of

[11] For example: ***Belgium***: for *wage-earners* the general rule is 28 days for under 20 years' service, and 56 days for 20 years or more; employment contracts may provide for seven days' notice for under six months' service; in some sectors periods are reduced or increased by Royal Order (hotels and garages). For *salaried employees*, where gross annual remuneration does not exceed a certain threshold, notice is at least three months for under five years' service, increased by three months for each additional period of five years. Where remuneration exceeds the threshold, notice is determined by agreement, based on factors such as the worker's age, length of service, job and remuneration.

[12] *Germany*: s. 622 of the Civil Code, as amended by the Act of 7 Oct. 1993 harmonizing periods of notice for dismissal of wage-earners and salaried employees. The notice period is four weeks, increased after the age of 25 years in proportion to length of service (one month for two years' service, up to seven months for 20 years' service). *Austria*: this distinction still applies.

[13] *Austria*: information supplied by the Federal Chamber of Workers.

[14] For example: ***Republic of Korea***: s. 27-2(1) of the Labour Standards Act: 30 days.

[15] For example: ***Belgium***: the notice period does not include certain specified periods for which the contract of employment is suspended (annual leave, pre- and postnatal maternity leave, detention pending trial, certain periods of military duty, incapacity for work (illness and injury), compensatory rest periods, total interruption of career). In these cases, notice is extended by the duration of the suspension. Similarly, if the employer gives notice during a period of suspension of the contract, the notice period begins only once the period of suspension has ended.

notice in the event that the period of notice is not observed. [16] One government stated that, while collective agreements provide for reasonable periods of notice, they do not guarantee compensation in lieu of notice. [17]

Loss of entitlement to a period of notice in the event of serious misconduct

249. Under Article 11 of the Convention, a worker may lose his entitlement to a period of notice or to compensation in lieu thereof if he is guilty of serious misconduct. Article 11 defines serious misconduct as misconduct of such a nature that it would be unreasonable to require the employer to continue the worker's employment during the notice period.

250. The definition of the concept of serious misconduct varies according to national law and practice. In a number of countries, the legislation provides that a worker may be dismissed without notice for "serious misconduct". In these cases, it is left to the bodies responsible for the application of the provisions to determine what constitutes misconduct justifying termination of employment without notice. [18] Sometimes legislation refers to the concept of gross misconduct [19] or draws a distinction between serious and gross misconduct. [20] In other countries, the terms of the legislation are similar to those of the Convention. Since this definition is fairly general, it is only by looking at the application in practice, and in particular case-law, that an assessment can be made of the extent to which the provisions of the Convention are observed. According to French case-law, serious misconduct is the result of an act or acts attributable to the employee which constitute a violation of the obligations under the contract of employment or employment relationship which makes it "impossible to maintain the employment relationship even during the period of notice". [21]

[16] For example: *Australia*: s. 170 DB(1) of the Industrial Relations Act, 1988, as amended by the Industrial Relations Reform Act, 1993; *Belgium*: remuneration includes, inter alia, bonuses and premiums averaged over the year (end-of-year bonus, double leave pay) and other benefits; *Cameroon*: s. 36 of the Labour Code of 1992: compensation amounts to wages and all other benefits; *Cyprus*: s. 10 of the Termination of Employment Act; *India*: Industrial Employment (Standing Orders) Act, 1946; *Madagascar*: s. 33 of the Labour Code; *Niger*; *Tunisia*: s. 16 of the framework collective agreement.

[17] *United States*.

[18] For example: *France, Morocco, Tunisia*.

[19] For example: *Benin; Cameroon*: s. 36 of the Labour Code: the contract may be terminated without notice in the event of gross misconduct, subject to an evaluation by the competent jurisdiction of the seriousness of the misconduct; *Central African Republic, Côte d'Ivoire, Gabon, Madagascar, Mali, Niger*.

[20] For example: *France*: gross misconduct is characterized by the employee's intention to harm the employer or the enterprise (*Cass. Soc.*, 29 Nov. 1990).

[21] *France* (*Cass. Soc.*, 17 Dec. 1987). See also, for example: *Germany*: s. 626 of the Civil Code; *Netherlands*: s. 1639p of the Civil Code; *Switzerland*: s. 337 of the Code of Obligations.

251. In other countries, behaviour regarded as justifying termination of employment without a period of notice is defined in more detail.[22] Where the definition is very detailed,[23] it tends to include theft, fraud or dishonesty; assaulting, threatening or insulting superiors or, sometimes, fellow workers; repeated violation of applicable rules (particularly those relating to safety); deliberate refusal to fulfil essential obligations under the contract of employment; disobedience of legitimate orders; habitual negligence; acts causing serious damage to property; habitual absence without leave or unpunctuality; habitually being in a state of drunkenness or under the influence of narcotic drugs during working hours; and conviction for a crime or an offence involving moral turpitude. Definitions of conduct justifying termination of employment without a period of notice also include, but less frequently, breach of trust (including disclosure of industrial or commercial secrets), misleading the employer at the time of the conclusion of a contract by submitting false information, and working for one's own benefit to the detriment of the employer.

252. In some countries with a common law tradition, the employer may dismiss a worker without notice if the latter gives "just cause" for such dismissal. The question of what constitutes just cause to justify termination of employment without notice depends on the interpretation of the courts, although "just cause" would generally appear to be interpreted as based on gross misconduct. Where the reason for termination of employment consists of "just cause", the worker is not entitled to a period of notice.[24]

Time off from work during the period of notice

253. In accordance with Paragraph 16 of the Recommendation, during the period of notice "the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties".

254. As noted above, one of the main purposes of the period of notice is to enable the dismissed worker who faces a change in his employment situation to take all the necessary steps and to look for a new job even before he leaves his present employer. However, given the fact that he should normally work full time during the period of notice, it is appropriate to allow him some free time during the hours for which he is paid so that he may look for a new job.

255. The legislation of some countries contains provisions recognizing the right of workers to "reasonable" periods of time off, or allows the worker "appropriate" or "necessary" time off to seek other employment,[25] while that of other countries specifies that during the period of notice the worker should

[22] For example: *Luxembourg*: s. 27(2) of the Act of 24 May 1989 on employment contracts.

[23] For example: *Poland*: s. 52 of the Labour Code.

[24] For example: *Canada*.

[25] For example: *Brazil, Qatar, Sweden*.

be granted one or two hours off work per day or one or two days off per week, or even longer periods, in order to look for a new job.[26] In most cases, the worker continues to be entitled to his full remuneration during such time off.[27] One government reported that the national legislation did not contain any provision concerning time off.[28]

Certificate of employment

256. In accordance with Paragraph 17 of the Recommendation, "a worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate".

257. This certificate may be useful to the worker in seeking new employment or for other purposes requiring information on his previous occupational activity. In order to prevent the employer from including negative evaluations that could jeopardize the worker's chances of finding a new job, the certificate should only contain the objective or factual data referred to in the Recommendation, unless the worker himself requests an evaluation of his work in this certificate or in a separate certificate, as envisaged in the Recommendation.

258. In many countries, legislative provisions require an employer to issue the worker at the time of the termination of the employment relationship, either automatically or at the latter's request, with a certificate[29] generally indicating the dates on which his service began and ended and the nature of the work performed.[30] In other countries, the certificate must, at the worker's request,

[26] For example: *Belgium*: wage-earners and salaried employees whose remuneration does not exceed a certain specified threshold are entitled to take time off once or twice a week, provided that the total time off does not exceed one working day (salaried employees whose earnings exceed the threshold can only take half a day off); *Cyprus; Czech Republic; Madagascar*: one day a week; *Mauritius; Niger; Poland; Portugal; Tunisia*: the entire second half of the notice period; *United Kingdom (Montserrat)*.

[27] For example: *Switzerland*: s. 324 of the Civil Code; *Tunisia*: s. 14bis of the Labour Code.

[28] *Finland*: in this respect, the Central Organization of Finnish Trade Unions (SAK) considers that time off should be granted to the worker.

[29] For example: *Mexico*: s. 132 of the Federal Labour Act.

[30] For example: *Central African Republic*: s. 56 of the Labour Code; *Côte d'Ivoire*: s. 50 of the Labour Code: dates of engagement and termination of employment, nature and dates of jobs held; *Mali*: the employer shall also indicate the occupational category under the collective agreement; in these two countries failure to issue the certificate makes the employer liable to pay damages; *Namibia*: s. 51 of the Labour Act 1992: the certificate mentions the amount of remuneration.

contain other information [31] or specify the reason for termination of the contract as well as the amount of remuneration. [32] In one country the law states that in addition to the prescribed certificate the employer may deliver to the worker a "certificate of character". [33] In another country, the certificate must not contain any references other than those requested by the worker. [34] Finally, in a number of countries where provision is made for work books, the reasons for the termination of employment are entered in the work book, which is given to the worker. [35]

[31] For example: *Portugal*.

[32] For example: *Malta*: Act No. XI of 1952.

[33] *Namibia*: s. 51 of the Labour Act, 1992.

[34] *Republic of Korea*: s. 31 of the Labour Standards Act, 1953.

[35] For example: *Russian Federation*.

CHAPTER VI

Severance allowance and other income protection

259. Under Article 12, paragraph 1, of the Convention, a worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to a severance allowance or other separation benefits, the amount of which shall be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions (paragraph 1(a)), or benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject (paragraph 1(b)), or a combination of such allowance and benefits (paragraph 1(c)).

260. Under Article 12, paragraph 2, a worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1(a) solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

261. Under Article 12, paragraph 3, provision may be made by the methods of implementation referred to in Article 1 of the Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1(a) in the event of termination for serious misconduct.

262. Severance allowance, one of several forms of income protection, needs to be distinguished both from the compensation paid in the event of unjustified termination of employment, when it is not practicable to declare the termination invalid or reinstate the worker (Article 10), and from the compensation in lieu of notice (Article 11). The three types of compensation vary in terms of the criteria taken into account to determine their amount. In the case of Article 10, the competent body, in awarding compensation, must order the payment of adequate compensation; in the case of Article 11, the compensation must be of such a nature as to compensate for the fact that the worker was not given a reasonable period of notice; the amount of the allowance prescribed by Article 12 must be calculated according to criteria prescribed by national legislation and practice based, inter alia, on length of service and the level of the wages.

263. On the basis of the preparatory work, the following explanations may be added in respect of this Article of the Convention as regards income protection. As regards the social security benefits referred to in paragraph 1(b),

the obligations deriving from the Convention may be met, for example in the event of the termination of the employment of a worker who has reached retirement age or who is recognized as being disabled, by granting an old-age or disability benefit, even in the absence of entitlement to a severance allowance or unemployment benefit. In the same way, the obligations could be discharged, for example, in the event of the termination of the employment of an older worker entitled to unemployment benefit followed by early retirement benefit, in accordance with the provisions of the Older Workers Recommendation, 1980 (No. 162).

264. A worker whose employment has been terminated can therefore benefit from a severance allowance or other separation benefits, or from benefits from unemployment insurance or assistance or other forms of social security, or from a combination of such allowance and benefits. However, by virtue of Article 12, paragraph 2, if a worker does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope, he cannot claim a severance allowance or other separation benefits solely because he is not receiving an unemployment benefit.

265. With regard to the definition of "serious misconduct", the reference to the definition included in Article 11 of the Convention was deleted from Article 12 during the preparatory work, in order to give some latitude to countries to define serious misconduct for the purposes of Article 12 differently from that in Article 11.[1] It should be emphasized that the inclusion of this provision in the Convention does not result in the obligation to refuse a severance allowance in the event of serious misconduct. In countries where the allowance is considered to be a deferred wage, for example, employers could be required to pay a severance allowance even in the event of serious misconduct. In the same way, in some countries the legislation makes a severance allowance an absolute right based on length of service; the right is acquired irrespective of the reason for termination of employment. Obviously, provisions which are more favourable to the worker are not incompatible with those of the Convention.[2]

266. Programmes or schemes intended to afford some income protection for workers whose employment is terminated vary significantly in their nature, methods of financing, qualifying conditions for entitlement to benefits, level of benefit and method of payment. Article 12 is intended to take account of these very different schemes and situations. It can be applied in the many countries (in particular developing countries) with general legislation providing for a severance allowance, but without social security schemes which provide unemployment or other benefits; in a number of industrialized countries with social security schemes of general scope, but which leave matters of severance allowance to collective bargaining; as well as in countries which have established both social security schemes and a severance allowance of general scope.

[1] ILC, 68th Session, 1982, Report V(2), pp. 38 and 44.

[2] Article 19, para. 8, of the Constitution of the ILO.

267. The *severance allowance* plays an important role in income protection in countries where a social security scheme does not provide such protection or where protection is inadequate. It also sometimes takes the form of a gratuity paid by the employer in reward for services rendered. The allowance is an obligation which rests on the employer, while social security schemes are generally financed by contributions from workers and employers or from public sources.

268. The flexibility contained in Article 12 allows countries to develop protection systems adapted to the specific conditions of their situation. For example, it allows developing countries to move gradually from a scheme providing only a severance allowance to one in which the protection afforded by the severance allowance is supplemented by partial protection under a social security scheme providing unemployment and old-age benefits, etc. On the other hand, it allows countries with unemployment insurance schemes to provide for severance allowances as well.

269. In most countries, the legislation contains provisions establishing allowances or the possibility of providing for allowances by collective agreement. [3] These allowances are generally paid directly by the employer or by a fund constituted by employers' contributions. A number of countries make entitlement to an allowance subject to the reason for termination of employment, in particular redundancy for economic reasons. [4] Sometimes the legislation provides for the payment of special allowances in the event of termination of employment for economic reasons, such as reductions in the workforce, retrenchment, reductions due to the installation of machinery, the application of

[3] For example: *Bangladesh*: ss. 9(b), (c), 9(3) and 16 of the Employment of Labour Standing Orders; *Botswana*: s. 28 of Act No. 26 of 1992; *Cambodia*; *China*: s. 28 of the Labour Law of 1994; *Dominican Republic*; s. 82 of the Labour Code of 1992; *Equatorial Guinea*: s. 75 of Act No. 2/1990; *Ethiopia*: s. 39 of Labour Proclamation No. 42 of 1993; *India*: Industrial Disputes Act, 1947; *Indonesia*: ss. 7(2), (3) and 12 of Act No. 12 of 1964; *Lebanon*: s. 51 of the Labour Code, 1946, as amended in 1993; *Malaysia*: s. 3 of the Employment (Termination and Lay-off Benefits) Regulations of 1980, as amended; *Mali*: s. 53 of the Labour Code of 1992; *Morocco*: Royal Decree No. 316-66; *Niger*: s. 41 of the Labour Code of 1962; *Peru*: Legislative Decree No. 650 of 23 July 1991; *Russian Federation*: ss. 33 and 36 of the Labour Code; *Saudi Arabia*; *Spain*: s. 52 of the Worker's Charter; *Thailand*: Notifications of the Ministry of Labour respecting labour protection, of 16 Apr. 1972 and 16 Aug. 1993; *Tunisia*: s. 22 of Act No. 94-29 of 21 Feb. 1994; *United Arab Emirates*; *Venezuela*: Labour Code of 1990; *Zaire*: s. 49 of the Labour Code.

[4] For example: *Azerbaijan*: ss. 38 and 45 of the Labour Code; *Cuba*: s. 11 of Resolution No. 4/91 CETTSS; *Germany*: severance allowance in case of collective redundancies by means of social compensation plans; *Madagascar*; *Poland*: Act of 1989 respecting the principles governing the termination of employment contracts for reasons due to the enterprise and to amend some other Acts; *Portugal*; *Seychelles*: Employment Act of 1990.

new working methods or the interruption or discontinuation of activities for specific reasons or the closure of enterprises.[5]

270. Entitlement to a severance allowance is often conditional on the completion of a minimum qualifying period, which varies from a few months to several years.[6] The Committee recalls that this Article of the Convention does not allow entitlement to a severance allowance to be made conditional on the level of wages or the length of service with the same employer.

271. In many countries, a worker loses his entitlement to a severance allowance if he is dismissed for serious misconduct, although this concept varies considerably. In general, it seems to be the same as that which entails loss of entitlement to a period of notice.[7]

272. The amount of the allowance is sometimes established, for example, at the equivalent of one or two months' wages.[8] In most countries, the amount depends on length of service or the amount of wages or is set at a flat rate.[9] In some countries, the amount may be increased by collective agreement.[10] It is sometimes limited to a maximum amount[11] or, conversely, may not be lower than a certain minimum amount.[12]

273. In most cases, *unemployment benefit* is provided through compulsory unemployment insurance schemes, usually financed by contributions from employers and insured persons (the workers covered by the scheme), sometimes by state subsidies or by contributions from employers only. There are also voluntary unemployment insurance schemes, constituted by funds set up by trade unions and financed in most cases by contributions from insured persons and government subsidies. Some countries have established unemployment assistance schemes, funded by public finances, either to supplement insurance schemes or

[5] For example: *Benin*: s. 28 of the general collective agreement; *Mexico*: s. 436 of the Federal Labour Act; *Russian Federation*: s. 25 of the Labour Code; *San Marino*: Act No. 108 of 1986; *Sweden*: Act of 13 Dec. 1984. In *Belarus*, a special allowance was paid to workers whose employment was terminated as a result of the Chernobyl disaster.

[6] For example: *Benin and Mali*: one year; *Gabon*: two years; *Hungary*: three years; *Malawi*: five years; *Botswana*: more than five years; *Switzerland*: 20 years (in addition, the worker has to be at least 50 years old).

[7] For example: *Bangladesh, Cambodia, Côte d'Ivoire, Malaysia, Mauritius, Senegal, Swaziland, Thailand, United Arab Emirates*. However, *Mexico* provides a severance allowance even in the event of dismissal for serious misconduct.

[8] For example: *Czech Republic*.

[9] For example: *Gabon*: 20 per cent of the average annual wage; *Mali*: less than five years of service: 20 per cent; 6-10 years: 30 per cent; *Portugal*: one month's wages for each year of employment; *Thailand*: one year: 30 days' wages; 1-3 years: 90 days; more than three years: 180 days; *Uruguay*: one month per year when the worker is paid on a monthly basis.

[10] For example: *Belarus*.

[11] For example, maximum amount: *Eritrea*: six months' wages; *Spain*: 12 months' wages.

[12] For example: *France*: s. L.122-9 of the Labour Code.

as the only source of unemployment benefit; under these schemes, entitlement to benefits is subject to a means test. Entitlement to unemployment benefit under these various schemes is generally subject to a number of conditions: the unemployment must be involuntary (termination of employment by the employer; termination which is not due to the worker's misconduct); the person concerned must meet minimum conditions regarding contributions (in the case of insurance schemes) or residence (in the case of assistance schemes); he must be fit and available for work and willing to accept suitable employment; he must normally be registered with an employment office and report regularly as long as the benefit is being paid. Persons who fulfil the prescribed conditions are usually entitled, after a waiting period of a few days, to benefits which generally consist of a specific percentage of the basic wage and supplementary benefits for dependants. Most of these schemes provide unemployment benefit only for a specified limited period. They are increasingly being supplemented by assistance schemes which may provide, subject to a means test, benefits for persons who have exhausted their entitlement under the insurance scheme. Private schemes set up by collective agreements or private insurance companies provide supplementary unemployment benefit, or in some cases constitute the only source of benefit. [13]

274. The Committee notes that a growing number of countries have established social security schemes in recent years. By 1993, 163 countries had set up a social security scheme; 63 of them had established unemployment benefit schemes. [14] In the countries of Central and Eastern Europe, the rapid rise in unemployment has led the governments to adopt provisions on unemployment benefit. [15] The situation is also developing in other regions, such as Africa, [16] Asia [17] and Latin America. [18] Governments faced with persistent

[13] The Committee recalls that two Conventions and two Recommendations deal specifically with unemployment benefit: the Unemployment Provision Convention (No. 44) and Recommendation (No. 44), 1934, as well as the Employment Promotion and Protection against Unemployment Convention (No. 168) and Recommendation (No. 176), 1988. It also recalls the general standards on social security covering different branches of social security and, in particular, the Income Security Recommendation, 1944 (No. 67); the Social Security (Minimum Standards) Convention, 1952 (No. 102); the Equality of Treatment (Social Security) Convention, 1962 (No. 118); the Maintenance of Social Security Rights Convention (No. 157) and Recommendation (No. 167), 1982. Furthermore, the Committee refers to different General Surveys on various aspects of social security and on migrant workers (see, for example, the General Surveys of 1961, 1980 and 1989).

[14] For detailed information, see: *Social security throughout the world*, 1993, table 1, p. xxxviii.

[15] For example: *Azerbaijan*; *Belarus*: Act No. 82 of 1991, Decree No. 236 of 1993; *Hungary*: Employment Act; *Poland*: Employment and Unemployment Act of 1991, Social Protection Act of 1990; *Russian Federation*: Population Employment Act of 1991, as amended; *Slovenia*: Employment and Unemployment Insurance Act.

[16] A number of countries, such as *Swaziland*, *Zambia* and *Zimbabwe* stated that they are in the process of amending their legislation to introduce a social security scheme or improve and extend existing schemes.

unemployment, in particular in the industrialized countries, are also focusing on employment promotion and human resource development in the hope of reducing social security expenditure related to unemployment benefit, by reintegrating unemployed persons into the labour market. The Committee notes that many countries provide for two systems: severance pay (sometimes only for reasons based on the operational requirements of the undertakings) as well as unemployment insurance or unemployment assistance schemes;[19] in some countries, the worker may receive unemployment benefit and also severance allowance.[20]

275. A worker whose employment has been terminated as a result of prolonged illness, disability (resulting from illness or accident) or reasons related to age may be entitled to benefit when the social protection schemes cover such contingencies,[21] and in such cases the question arises of the accumulation of benefits, including the severance allowance. The provisions adopted in some countries lay down the way in which these benefits, such as disability or old-age benefits, may affect entitlement to unemployment benefit or a severance allowance.[22]

[17] *Thailand* has adopted a Social Security Act (1990) which includes provisions on unemployment benefit; in the *Republic of Korea* the Employment Insurance Act of Dec. 1993 will come into effect on 1 July 1995.

[18] New insurance schemes have been introduced, for example, by *Argentina* (National Employment Act No. 24013 and Decree No. 739 of 1992) and *Venezuela* (Decree No. 2870 of 1991).

[19] For example: *Cyprus*: Social Insurance Law; *Czech Republic*: Act No. 1 of 1991; *Italy*: Act No. 223 of 1991; *Republic of Korea*: Act of 1993, op. cit.; *Mauritius*; *Portugal*: Legislative Decree No. 79A/89, as amended by Legislative Decree No. 418/93; *Spain*: Act No. 31/84, Legislative Decree No. 625/1985, as amended; *Switzerland*: Federal Act on Unemployment Insurance of 1982; *Tunisia*: National Social Security Fund; *United Kingdom*: Social Security Contributions and Benefits Act, 1992, Social Security Administration Act, 1992, and various regulations.

[20] For example: *France; Germany* (social compensation plans).

[21] For example: *Indonesia*: Act No. 3 of 1992 concerning employees' social security.

[22] In some cases unemployment benefit or severance payment may be excluded (for example: *United Kingdom, Venezuela*: workers over pensionable age), or increased (for example: *Mauritius*: workers who do not satisfy the conditions for eligibility for old-age benefits).

CHAPTER VII

Terminations of employment for economic, technological, structural or similar reasons

I. Supplementary provisions of the Convention

276. Part III of the Convention, entitled "Supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons",[1] contains two Articles, one (Article 13) relating to information and consultation of workers' representatives and the other (Article 14) to notification to the competent authority. These Articles must be read in conjunction with Parts I and II of the Convention, and in particular with Articles 2 (scope),[2] 3 (definitions), 4 (justification), 8 to 10 (procedure of appeal). Indeed, Articles 13 and 14 supplement rather than replace the preceding Articles of the Convention. Termination of employment, whether for economic, technological or other reasons, must therefore be justified and accompanied by procedures of appeal in accordance with the provisions of Article 4 relating to justification for termination. As the Committee noted in Chapter III, reasons based on operational requirements generally include reasons of an economic, technological, structural or similar nature. As the Committee has just noted, terminations of employment for these reasons must be based on a valid reason, in conformity with Article 4 of the Convention.

277. Furthermore, the Convention does not establish any specific quantitative criterion or threshold for the number of terminations of employment beyond which the procedures provided for in Articles 13 and 14 are applicable. These procedures could therefore apply from the termination of the employment of just one worker if national methods of implementation so stipulate. It should, however, be emphasized that the Convention allows each State to limit the applicability of Articles 13 and 14 to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce. Indeed, in the large majority of countries the consultation and notification procedures apply to the termination of the employment of a specified number of workers or percentage of the total

[1] It should be noted that these "supplementary provisions" are legally binding.

[2] Thus, for example: the exclusions from the scope of the Convention that are deemed necessary may also apply to Arts. 13 and 14 of the Convention.

workforce, with particular reference to the concept of "collective" termination of employment.

278. Articles 13 and 14 encompass a number of objectives (mainly to avert or minimize terminations of employment and mitigate their consequences) within the framework of certain procedures, namely information and consultation of workers (Article 13) and notification to the authorities (Article 14). A State which ratifies the Convention therefore undertakes to comply with these procedures.

Information and consultation of workers' representatives

279. Under Article 13, paragraph 1, of the Convention, "when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall: (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out; (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimize the terminations and the measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment".

280. As pointed out above, Article 13, paragraph 2, allows the applicability of paragraph 1 to be limited by the methods of implementation referred to in Article 1 of the Convention "to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce".

281. Article 13, paragraph 3, specifies that the term "the workers' representatives concerned" means the workers' representatives recognized as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971 (No. 135).[3] This wording was introduced during the preparatory work, with a view to defining the meaning of workers' representatives to ensure the holding of real, and not merely formal consultations.[4]

282. The Convention refers only to the objectives of consultation, that is the measures to be taken to avert or minimize the terminations of employment and to mitigate their adverse effects. Except for an explicit reference to "finding alternative employment", the Convention does not indicate the substantive content of such measures. It therefore leaves the determination of their content to national methods of implementation. The matters covered by such consultation might usefully, although they do not have to be based on Recommendation

[3] See above, Ch. III, para. 112, note 49.

[4] ILC, 67th Session, 1981, *Record of Proceedings*, p. 33/16.

No. 166, Paragraphs 21 to 26, which specify the kind of measures which could be adopted. Since specific mention is made in the Convention of measures to find alternative employment, consultations should in any event include this aspect of the measures. Finding alternative employment, either within the establishment or elsewhere, is one of the measures which can be taken to avoid terminations of employment and mitigate the adverse effects.

283. The opportunity for workers' representatives to be consulted, as the Committee has pointed out above,[5] reflects a situation which differs from mere information or co-determination; it should be able to have some influence on the decision taken. In particular, consultation provides an opportunity for an exchange of views and the establishment of a dialogue which can only be beneficial for both the workers and the employer, by protecting employment as far as possible and hence ensuring harmonious labour relations and a social climate which is propitious to the continuation of the employer's activities. Indeed, transparence is a major element in moderating or reducing the social tensions inherent in any termination of employment for economic reasons.

284. For consultation to have a chance of making a positive contribution, the Convention stipulates that it must take place "as early as possible", which would allow the possible measures to be contemplated without haste and with circumspection.

285. For the workers' representatives to be able to participate in consultations with the necessary information to allow them to put forward their ideas on the measures which might be taken, the employer must provide information "in good time", which must be "relevant" and include the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out. This information allows the workers' representatives to engage in the consultation with the necessary information to enable them to evaluate the situation. In the absence of relevant information on the proposed terminations of employment, the workers' representatives would not be able to participate effectively and genuinely in such consultations and the objective of the Convention would not be achieved. The information can be provided in writing or orally, since the Convention does not specify the manner in which it is to be presented.[6]

Notification to the competent authority

286. Under the terms of Article 14, paragraph 1, of the Convention, "when the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible,

[5] Ch. II, paras. 60-61.

[6] During the preparatory work, the obligation to provide information in writing was deleted to make the instrument more flexible; it was considered that the obligation to provide information was more important than the manner in which it is presented. ILC, 67th Session, 1981, Report VIII(2), p. 99.

giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out".

287. Under the terms of paragraph 2, national laws or regulations may limit the applicability of paragraph 1 "to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce".

288. Paragraph 3 states that the employer must notify the competent authority of the terminations "a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations".

289. The Convention does not specify the time when the notification should be made, and in particular whether this should be done during or after the consultation. The time will depend on the national methods of implementation and in particular on the respective role of the workers' representatives and the competent authority. As in the case of consultation, notification must be made "as early as possible". The reasons for the terminations must be given in a written statement.

290. It should be emphasized that Article 14 of the Convention does not refer to the role which might be played by the competent authority to which notification is made. It therefore allows each country to determine the purpose of notification.

II. Information, consultation and notification under Recommendation No. 166

291. Under Paragraph 19 of Recommendation No. 166: "(1) The parties concerned should seek to avert or minimize as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned. (2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated."

292. This provision refers to objectives which the parties should pursue. The specific measures which might be adopted are mentioned in Paragraphs 21 et seq. of the Recommendation. The objectives are to avert or minimize as far as possible terminations of employment and to mitigate their adverse effects. The phrase "without prejudice to the efficient operation of the undertaking, establishment or service" draws attention to the need to take account of the requirements of the enterprise, establishment or service, as well as those of the workers.

293. The Recommendation gives a more active role to the competent authorities than the Convention, since it calls upon the authorities to help the parties find solutions to the problems raised by the proposed terminations of

employment. These solutions may include means to avert or minimize terminations of employment, or, where this is not possible, they may consist of establishing and implementing different measures to help workers, in particular in the search for a new job.

294. As regards the content of the consultations, the Recommendation adds a further component to the objectives laid down by the Convention. While the Convention refers to measures to be taken to avert or minimize the terminations of employment, the Recommendation proposes consultations on measures before the stage at which the terminations become inevitable. Terminations of employment are sometimes the result of major changes in the organization, structures, technology and methods of work of enterprises and a satisfactory solution to the problems involved is usually more likely to be found if the underlying problems are tackled early on. Under Paragraph 20, subparagraph 1, of the Recommendation, "when the employer contemplates the introduction of major changes in production, programme, organization, structures or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes". Under subparagraph 2, "to enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have".

III. National law and practice as regards information, consultation and notification

295. National procedures for information, the consultation of workers' representatives and notification to the competent authorities vary widely. In some countries, such procedures do not seem to exist.[7] Where such procedures have been established, the degree of constraint varies. The information provided on existing procedures related in most cases to the notification of the proposed terminations of employment to the competent authority and, less often, to information and the consultation of workers. The information available to the Committee consisted mainly of legislative provisions on the subject. The Committee notes that in countries in which procedures are mainly regulated by legislation, such legislation is constantly changing and being amended, in particular as regards the content of measures to mitigate the consequences of terminations of employment. Furthermore, case-law continues to have a major influence on the development of provisions, both in terms of their interpretation and the establishment of principles which are then incorporated into legislation.

[7] For example: *Barbados*: the Barbados Employers' Confederation, the Barbados Hotel and Tourism Association and the Barbados Workers' Union recently signed a protocol on job security in the hospitality industry; *Saudi Arabia*.

In addition to interoccupational collective agreements or central agreements which have played and in some cases continue to play a major role in this respect, mention should also be made of more specific agreements, such as joint agreements in specific sectors on collective terminations of employment or agreements on certain aspects of the organization or structure of enterprises which may entail workforce reductions.

Information and consultation

296. Prior information on major changes which may have repercussions on employment must be provided in some countries in accordance with legal provisions or collective agreements. General provisions are often included in mechanisms for worker participation requiring their representatives to be periodically informed of the operation of the enterprise and management plans. [8] Sometimes more specific obligations are prescribed and workers' representatives must be informed of changes affecting the organization, structure, technology and methods of work of the enterprise which may entail staff reductions. [9] The communication of such information is sometimes obligatory only if the enterprise is of a certain size and therefore employs more than a specified minimum number of workers. [10] The information must normally be provided within a certain period of time before the proposed changes. [11]

297. The role assigned to the workers' representatives following the communication of information is generally of an advisory nature. In some cases,

[8] For example: *Belgium*: national collective agreement No. 9 of 1972 respecting works councils, which deals with information and consultation of works councils on the general outlook for and employment in the enterprise; collective agreement No. 39 of 13 Dec. 1983 on the social consequences of the introduction of new technology, which establishes a procedure for information and concertation in such circumstances in enterprises with more than 50 workers; *Germany*: s. 106 of the Works Constitution Act (in enterprises with more than 100 workers); *Switzerland*: s. 9 of the Participation Act of 1 May 1994, under which the employer has to inform the body representing the workers at least once a year regarding the impact of the business situation of the enterprise on employment and the workplace.

[9] For example: *Austria*: s. 109(1) of the Works Constitution Act; *Finland*: Co-management Act; *Germany*: s. 111 of the Works Constitution Act: obligation to provide the works council with detailed information on proposed changes in the enterprise which may have an adverse effect on staff or on a major part of the workforce, and in particular the reduction of activities and the closing down of all or large parts of the enterprise, the transfer of the enterprise or large parts of the enterprise, merger with other enterprises, important changes affecting the organization of the enterprise, its objectives or industrial installations, the introduction of entirely new methods of work or manufacturing processes; *Portugal*: Act No. 46/79.

[10] Specified number of workers: *Finland*: enterprises employing more than 30 workers; *Germany*: 20; *Luxembourg*: 150.

[11] For example: *Austria*: as soon as possible; *Finland*: the trade union SAK has emphasized that the Co-management Act should specify the time when the employer should provide information and begin consultation; *Germany*: in good time; *Luxembourg*: before any decision is taken on the matters in question.

the employer may be required to negotiate with the representatives.[12] In *Hungary*, the employer must consult the works council before taking decisions affecting the employment of a large group of employees, such as proposals for the reorganization or transformation of the enterprise or the conversion of an organizational unit into an independent unit or the privatization or modernization of an organizational unit.[13]

298. In a significant number of countries, workers' representatives must be notified of the terminations of employment contemplated.[14] In one country whose government pointed out that there was no general statutory obligation for the employer to consult workers in the event of staff cuts, the courts have however ruled that part of the employers' implied duty to act fairly and reasonably may, in certain circumstances, require them to discuss restructuring with the employees affected or their representatives before taking a final decision.[15]

299. The principle nevertheless varies from one country to the other, especially with regard to the terminations of employment for which information must be given, and the contents and purpose of this information.

300. Although, in some countries, information is required if even the employment of one worker is terminated for economic reasons,[16] information and consultation procedures are established in many countries in the case of collective terminations of employment and above a minimum number or certain percentage of workers affected during a specific period of time.[17] They sometimes apply only to mass lay-offs.[18] The reasons vary from country to country and may include plant closures, reorganization of the enterprise, suspension of production, production cut-backs or difficulties, abolition of

[12] For example: *Sweden*: s. 29 of the Act respecting the protection of employment.

[13] *Hungary*: s. 65 of the Labour Code of 1992.

[14] For example: *Austria, Azerbaijan, Belarus, Belgium, Cameroon, Colombia, Côte d'Ivoire, Croatia, Czech Republic, France, Gabon, Germany, Guinea, Iceland, Italy, Luxembourg, Mali, Mexico, Peru, Poland, Portugal, Russian Federation, San Marino, Senegal, Slovakia, Slovenia, Spain, Switzerland, United Kingdom* and *United States* (at federal level and in some federal states).

[15] *New Zealand*: however, the New Zealand Council of Trade Unions (CTU) states in its comments that the Employment Court has ruled that there is no rigid check-list that can be automatically applied to determine procedural fairness. *GWD Russells (Gore) Ltd.* v. *MUIR [1993] ERNZ 332(EC) 343*.

[16] For example: *Czech Republic*; *Guinea*: s. 80 of the Labour Code of 1988: on the grounds of organization, restructuring or the closing of the enterprise when the post is eliminated.

[17] For example: *France*: dismissal of ten persons over a 30-day period; *Italy:* five workers over a 120-day period; *Luxembourg*: seven workers over a single period of 30 days or 15 workers over a period of 90 days; *Spain*: ten workers over a 90-day period in enterprises with fewer than 100 workers; 10 per cent in those with 100 to 300 workers; 30 workers in those with more than 300 workers; *United Kingdom*: ten to 99 workers over a 30-day period; 100 or more over a 90-day period. See also notification to the competent authority, below.

[18] For example: *United States*: 29 USC, para. 2101: plant closures and "mass lay-offs".

certain manufacturing processes, conversion of activities or jobs, reorganization, adjustment, restructuring, reasons unrelated to the worker himself.[19] One government pointed out that the procedure does not apply if a job is abolished.[20] Definitions or regulations in this area are important because they set certain procedures in motion.[21] In order to guarantee the application of the Convention, care must be taken that any adjustments made by the employer to the number of terminations of employment and the period during which they take place do not result in the guarantees laid down in the Convention being evaded. National provisions usually specify how long before the consultation the information must be provided (these periods vary considerably[22]), as well as the form the information should take.[23]

301. As regards the content of the information, this is usually along the lines required by the Convention,[24] but it may sometimes also contain other items, such as criteria for the selection of the workers whose employment is to be terminated.[25]

302. The purpose of the information, as set down in the relevant provisions, also varies. It may be intended merely to provide information[26] or

[19] For example: *Belarus*: s. 8, Part 3, of the Act on trade unions: closure or partial or total reorganization, suspension of production; *Benin*: reduction of activities, reorganization; *China*: s. 27 of the Labour Law, 1994: production and management difficulties; *Colombia*: adjustment to modernization of processes, abolition of processes, risk of bankruptcy; *Côte d'Ivoire*: consecutive cut-backs and conversion measures resulting from technological changes, restructuring or economic difficulties likely to jeopardize the enterprise's activity and financial health; *Croatia*: technological, structural, organizational and economic reasons; *Italy*: cut-back or conversion of activities: the reasons given to justify redundancy must be valid and not be a pretext for getting rid of certain employees; *Mali*: reasons unrelated to the worker himself, abolition or conversion of jobs, substantial changes in the employment contract resulting from economic difficulties or transfers; *Poland*: economic reasons, structural, technological or production changes.

[20] *Portugal*: however, certain guarantees are provided for.

[21] For example: *France*: the procedure is contingent upon whether the termination of employment affects only one worker, from two to nine workers or at least ten workers over a 30-day period, or whether it affects at least 50 workers.

[22] For example: *Belarus*: three months; *China*: 30 days; *Côte d'Ivoire*: at least eight days before the information and consultation meeting; *Czech Republic*: three months; *Poland*: 45 days at least before the date of notification of termination; *Slovakia*: three months; *United Kingdom*: 30 days (if termination affects from ten to 99 workers); 90 days (if 100 and above).

[23] For example: *Switzerland* and *United Kingdom*: in writing.

[24] For example: *Guinea*: reasons, number, categories of employees, period, reclassification measures; *Czech Republic*: reasons, number, categories.

[25] For example: *Côte d'Ivoire*: reasons, criteria applied, list of persons whose employment is to be terminated and date of the termination.

[26] For example: *Colombia; United States*.

to lead to consultation, or even negotiation,[27] with the workers' representatives to try and reach a common position or agreement.[28] As a general rule, consultation must take place within a prescribed time-limit.[29]

303. In various countries, the consultation of workers' representatives takes place in two stages. At a first meeting, the employer and the representatives examine all possible ways of avoiding terminations of employment; the measures agreed upon are recorded in a report. If the terminations nevertheless prove necessary (or if there is no agreement), the employer draws up a list specifying the order in which the terminations will take place and communicates this to the representatives. Their reply, the form of which might vary (in writing or at a new meeting), and the employer's communication are submitted to the labour inspector.[30]

304. In a number of countries, consultations focus not only on the measures designed to avert or minimize terminations of employment, but also on how to mitigate their adverse effects: The employer is bound to draft and submit to the workers' representatives, so that he can take into account their views or negotiate with them, the accompanying social measures, such as a "programme of settlement of the manpower surplus problem",[31] a "programme

[27] For example: *China*: s. 27 of the Labour Law: the unit may resort to cut-backs after having explained the situation to the trade unions or to the staff as a whole, asked their advice and submitted a report to the labour administration; *Côte d'Ivoire*: s. 2 of Act No. 92-573: meeting to provide information and explanations; *Czech Republic*; *Guinea*: s. 87 of the Labour Code: contemplated terminations submitted for opinion; *Republic of Korea*: consultation procedures are normally provided for in collective agreements; if this is not the case, the employer must nevertheless consult in good faith; *Namibia*: s. 50 of the Labour Act, 1992: the employer is bound to inform the workers' representatives, and to provide them with the opportunity of negotiating the conditions and circumstances under which the terminations are to be carried out in order to minimize or avert any adverse effects on the employees.

[28] For example: *Niger*: the social partners have completely changed course by replacing terminations of employment on economic grounds by a sort of contractual policy carried out through the impetus of the labour administration services leading to so-called voluntary separations. These consist of a breach of contract by consent backed by accompanying measures for the workers who are leaving; *Peru*: negotiations are initiated to try and reach an agreement on the conditions of the collective termination or measures which might be adopted to avert or minimize it; *Poland*: the head of the enterprise and the trade union organization must reach an agreement specifying the termination procedures, the selection criteria, the order and timing of the terminations and obligations of the enterprise concerning the settlement of any other problems. If no agreement is reached, the procedures are decided upon by the head of the enterprise taking into account the points upon which the parties have agreed during consultations.

[29] For example: *Italy*: 45 days; *Luxembourg*: 15 days.

[30] For example: *Cameroon*: s. 40 of the Labour Code of 1992; *Mali*: ss. 47 and 48 of the Labour Code of 1992.

[31] For example: *Croatia*: the employer has to draw up a programme to settle the manpower surplus problem, in which the workers' representatives are involved, which contains the reasons for the surplus, the possible changes in the organization and work process, the possibilities of redeployment to other posts or other enterprises, as well as opportunities for training and cuts in working time.

on the treatment of workers unable to be retained in employment" [32] or a "social plan". [33]

305. The Committee notes that a number of governments mentioned that, although consultation is not institutionalized (nor is notification to the competent authority), a certain form of information or consultation does, however, exist in practice. [34]

306. At the actual time the terminations of employment are contemplated, it should be pointed out that, apart from ad hoc negotiations, collective bargaining in general plays a vital role in the defence of employment when there is a risk of large-scale terminations. Indeed, bargaining covers such issues as the enterprise's restructuring, technological and financial policies and, increasingly, the issue of employment security. [35]

[32] For example: *Slovenia*.

[33] For example: *France*: similar provisions introduced in 1989 apply to enterprises with more than 50 employees; these have just been strengthened by changes introduced in 1993 which make it compulsory for an enterprise to put forward a plan for the redeployment of its employees as part of its social plan, failing which its termination procedures may be declared null and void and its actions considered inadequate by the respective authority. This plan must provide for measures such as redeployment within or outside the enterprise, the creation of new activities, training or retraining programmes and measures to cut or rearrange working time (Act No. 89-549 of 2 Aug. 1989 and Act No. 93-121 of 27 Jan. 1994). The social plan must be not only realistic but also consistent; in other words it must clearly specify the ways and means by which it is to be implemented. If there is any uncertainty as to the employer's commitments, the administration may refuse to accept the social plan because it is incomplete (circular of 7 June 1994); *Germany*: the employer and the workers' representatives have to make an arrangement concerning their respective interests, which implies negotiation; *Luxembourg*: Act of 23 July 1993 on various employment promotion measures: before carrying out collective terminations, the employer is bound, in due time, to hold negotiations with the workers' representatives with a view to reaching an agreement on the establishment of a social plan. The negotiations centre on the possibility of averting or minimizing the number of terminations and on ways of mitigating their adverse effects, either by adopting accompanying social measures designed to help redeploy or retrain workers and provide opportunities for immediate reintegration in the labour market, or by establishing financial compensation.

[34] For example: *Malta*: the trade union tries to reach an agreement with the employer, so that it can be informed in advance of the terminations contemplated; *Singapore*: the employers provide information on reasons for the terminations, or would do so at the request of the employees or trade unions. Furthermore, collective agreements usually contain a clause obliging employers to inform trade unions of any cuts envisaged; the trade union may contest the reasons given by the employer and refer the matter to the Ministry of Labour for conciliation.

[35] The Economic and Social Institute (NSI) of the German Confederation of Trade Unions (DGB) stresses that job security has become a major issue in wage bargaining in 1994. The trade union submitted specific proposals on ways of maintaining and providing support for jobs through wage bargaining (NSI, document No. 22 of Jan. 1994).

307. The workers' representatives concerned usually correspond to the definition of representatives laid down in the Convention.[36] In one country, procedures relating to termination of employment are laid down in regulations drawn up by the head of the enterprise after consulting with the workers, when there is no in-house trade union.[37] In another country, collective terminations of employment may not be carried out before a staff delegation has been appointed.[38] Situations may also arise in which consultations cannot take place because there are no representatives within the enterprise, either because the workers have not appointed representatives or because consultation is only provided for if the enterprise employs more than a specific number of workers. As concerns the latter category of enterprises, namely small and medium-sized enterprises, which still account for a large proportion, if not the majority of enterprises in some countries, the Committee notes that the national legislation and collective agreements frequently exclude them from information and consultation procedures (as well as notification) by introducing a minimum threshold below which these procedures do not apply.[39] Moreover, this threshold often overlaps with provisions under which works committees can only be set up in enterprises employing a certain number of workers.[40]

Notification to the competent authorities

308. From the information communicated by governments in their reports, it appears that it is obligatory in many countries to notify the competent authority of terminations of employment for economic, technological, structural or similar reasons.[41] This requirement supplements procedures for information and consultation with workers' representatives in countries where these exist. In other countries, it is the only procedure established.

309. The competent authority is usually a labour inspector,[42] a public employment service,[43] or a ministry.[44] In one country, although there is no

[36] For example: *Belarus* (trade unions); *China* (trade unions or staff as a whole); *Luxembourg* (staff delegates or joint committees or trade union organizations in the case of enterprises bound by a collective agreement).

[37] *Poland*: s. 4 of the Act of 28 Dec. 1989.

[38] For example: *Luxembourg*: s. 7 of the Act of 23 July 1993.

[39] For example: a specified number of workers: *Germany* (20); *Italy* (15).

[40] For example: *Germany* (6).

[41] For example: *Australia, Austria, Azerbaijan, Belarus, Belgium, Benin, Burkina Faso, Cameroon, Canada, Colombia, Côte d'Ivoire, Cyprus, Czech Republic, Equatorial Guinea, Finland, France, Gabon, Germany, Guinea, Italy, Latvia, Lebanon, Luxembourg, Mali, Mauritius, Mexico, Namibia, Panama, Peru, Poland, Portugal, Russian Federation, Senegal, Slovakia, Spain, Sudan, Switzerland, United Kingdom* and *United States*.

[42] For example: *Chile, China, Côte d'Ivoire, Guinea, Mali, Senegal*.

[43] For example: *Azerbaijan, Israel, Norway*.

[44] For example: *Benin, Colombia, Lebanon*.

obligation, employers are nevertheless advised to inform the authorities of terminations of employment. [45]

310. The provisions concerning the information to be communicated to the competent authority normally specify the period [46] within which the notification must be made, the form of the notification and the type of information which should accompany the notification. [47] These requirements usually correspond to one or more of the items mentioned in the Convention. They sometimes call for additional information, which may include the criteria applied or possibilities of redeployment. [48] In countries in which provision is made for consultation with the workers' representatives, the employer must usually indicate to the competent authority the information it has given to the workers' representatives, provide information on the consultation and its outcome, or communicate the representatives' opinion or response. [49] Although the legislation usually applies to termination of the employment of a specified number or percentage of workers, [50] it may also refer to the termination of one worker [51] or, on the contrary, concern only mass terminations. [52]

311. Notification is generally intended to inform the authority of the terminations contemplated which might cause economic problems and place a burden on public expenditure and to enable them to help the parties concerned

[45] *Republic of Korea*: since 1986, employers have been advised to inform the regional employment office if they terminate the employment of more than five workers.

[46] For example: *Benin*: 60 days; *Chile*: 30 days; *Côte d'Ivoire*: eight days at least; *Latvia*: two months; *Lebanon*: one month; *Luxembourg*: at the latest at the beginning of negotiations between the employer and the workers' representatives; *Portugal*: the same day on which the workers' representatives are informed.

[47] For example: written reports, *Colombia, Côte d'Ivoire, Guinea, Mali, Mauritius*.

[48] For example: *Azerbaijan*: number, jobs, wages, length of service and skills level; *Colombia*: grounds for termination and, where applicable, the necessary justification for these terminations; *Côte d'Ivoire*: grounds, criteria, list, date; *Guinea*: name, skills, date and redeployment measures.

[49] For example: *Czech Republic, Italy, Senegal*.

[50] For example: *Australia*: 15 or more workers; *Benin*: Act No. 90-004: collective termination for economic reasons; *Colombia*: s. 67 of Act No. 5/1990: collective terminations (30 per cent of workers if the enterprise employs between ten and 50 workers; 20 per cent if the enterprise employs between 50 and 100 workers; 15 per cent if the enterprise employs 100 to 200 workers; 9 per cent if the enterprise employs 200 to 500 workers; 7 per cent if the enterprise employs 500 to 1,000 workers; 5 per cent if the enterprise employs more than 1,000 workers); *Latvia*: termination of more than 25 persons; *Poland*: termination of at least 10 per cent of staff in enterprises employing up to 1,000 workers, or at least 100 workers in those employing more than 1,000 workers; *United Kingdom (Montserrat)*: from ten workers upwards.

[51] For example: *Chile, Guinea, Mali, Sri Lanka*.

[52] For example: *United States*.

to find solutions to the problems raised by the contemplated terminations.[53] In some countries, the authorities may be called upon to carry out conciliation,[54] although the procedures vary and the repercussions differ in the event of non-conciliation. In some countries, they may extend the period of consultation[55] or be competent to authorize the planned terminations of employment.[56] In this respect, the role of the authority varies depending on the number of workers whose employment is to be terminated,[57] authorization sometimes being required for all terminations, even for one worker.[58]

312. Although in some cases legislation does not specifically outline the role of the competent authority, but simply indicates that it must receive notice of proposed terminations of employment,[59] in others it plays a more active role. The employer may, for example, be required to cooperate with the authority.[60] The authority may decide to consult the workers' representatives,

[53] For example: *Lebanon*: the employer must consult the Ministry with a view to drawing up a final programme concerning the termination of contracts; *Mali* and *Senegal*: the labour inspectorate may provide assistance.

[54] For example: *Italy*: the provincial employment office must make an attempt at conciliation which must be completed within 30 days; in the event of non-conciliation, the employer is once again free to act and may request that surplus workers be made redundant; *Luxembourg*: conciliation is carried out by the National Conciliation Board; *Peru*: conciliation must take place within eight days; after this period, the labour administration must give a decision within five days; *Tunisia*: s. 21 of the Labour Code: if there is no conciliation, the labour inspectorate calls a meeting of the Committee to Monitor Terminations of Employment.

[55] For example: *Greece*.

[56] For example: *Colombia*: s. 67 of Act No. 5/1990; *Equatorial Guinea, Mexico, Sudan*. *Dominican Republic*: Resolution No. 32/93: the general director of labour must approve terminations resulting in the closure of the enterprise or a final reduction in staff. The employer is bound to pay the economic assistance provided for in the Labour Code within ten days, failing which the termination is not legally valid and does not affect the worker.

[57] For example: *Guinea*: notification is carried out for information purposes where fewer than ten workers are to be terminated; for any more than that, terminations must be authorized.

[58] For example: *Panama*: s. 215 of the Labour Code; *Sri Lanka*: the employer may not dismiss a worker in a specified post without the prior written authorization of the worker and the written approval of the Commissioner of Labour (the Termination of Employment of Workmen (Special Provisions) Act, No. 45 of 1971, which applies to termination for any reason whatsoever, other than by reason of a punishment imposed by way of disciplinary action; according to the information provided by the Lanka Jathika Estate Workers' Union it applies in the event of staff reductions).

[59] For example: *Canada* (Provinces of British Columbia, New Brunswick, Nova Scotia, Yukon and North West Territories).

[60] For example: *Canada* (federal jurisdiction; Provinces of Manitoba, Ontario and Quebec).

and ask the employer and the representatives to collaborate in seeking solutions to minimize the number of terminations and mitigate their effects. [61]

313. The employer may only carry out the proposed terminations of employment upon the expiry of a "minimum" time period. This period generally varies depending on the number of workers whose employment is to be terminated, in accordance with national methods of implementation. [62]

314. Furthermore, in the event of non-compliance with consultation and/or notification procedures, legislation and collective agreements generally make provision for various forms of sanctions that can be applied cumulatively, such as fines, [63] compensation, [64] or even the invalidation of the terminations of employment. [65] In one country, terminations of employment carried out without the approval of the committee responsible for monitoring terminations of employment are considered to be wrongful. [66] In some countries, the legislation specifies that the authorization of the competent authority will be refused if legal provisions with regard to terminations of employment for economic reasons have not been complied with, if certain conditions have not been met or, more specifically, if the measures to promote the alternative employment of workers are inadequate or no such measures have been adopted. [67]

[61] For example: *Canada*: the minister can ask the employer and the employee representatives to participate in a joint planning committee whose general mandate is to eliminate the necessity for the termination or to minimize its impact and help redundant employees to find alternative employment.

[62] For example: *Luxembourg*: collective terminations take effect after a period of 75 days, which may be extended to 90 days; *Mali*: s. 148 of the Labour Code of 1992: the employer may carry out the terminations after meeting with the staff delegates. The list of dismissed workers and the minutes of the meeting are immediately communicated to the labour inspector for information.

[63] For example: *United Kingdom*: in the event of failure to carry out the obligation to notify.

[64] For example: *United Kingdom*: in the event of non-compliance with procedures, an industrial tribunal can award compensation to the workers affected.

[65] For example: *Colombia*; *France*: workers' representatives may take legal action to have a collective termination for economic reasons annulled for the inadequacy of the "social plan". Furthermore, the labour inspectorate that has had the plan submitted to it may draw up an "insufficiency report" within a week of receiving the plan; *Luxembourg*: any notification of a termination that has been carried out prior to the adoption of the social plan, the conciliation procedure of the National Labour Office, or the establishment of a staff delegation, is null and void.

[66] *Tunisia*: s. 21 of the Labour Code.

[67] For example: *France*: "social plan".

IV. Specific measures contained in the Recommendation to avert or minimize terminations of employment and to mitigate their effects

315. The provisions contained in the Convention concern procedures to be followed in order to avert or minimize termination of employment and to mitigate its effects. The Recommendation also refers to these procedures, but in addition puts forward a number of specific measures to achieve this aim. Furthermore, it contains provisions with regard to the criteria to be applied in selecting workers whose employment is to be terminated and in determining priority of rehiring workers whose employment has been terminated. Lastly, it includes provisions on the measures to be taken to mitigate the effects of termination of employment.

316. A number of governments provided information on one or more aspects of the measures put forward in the Recommendation. As these measures generally come within the wider framework of employment and training policies, the Committee draws attention to the general part of its report on the application of the Employment Policy Convention, 1964 (No. 122), as well as to individual observations on that Convention. It also refers to its 1991 General Survey on human resources development[68] in which it looked at measures to facilitate training and retraining assistance.

Measures to avert or minimize termination

317. Under the terms of Paragraph 21, "the measures which should be considered with a view to averting or minimizing terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work".

318. It should also be recalled that Article 13 of the Convention, when mentioning measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse affects of any terminations on the workers concerned, specifically refers to "finding alternative employment".

319. Paragraph 22 of the Recommendation states that, "where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimize terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of

[68] *Human Resources Development — General Survey of the Reports on the Paid Education Leave Convention (No. 140) and Recommendation (No. 148), 1974, and the Human Resources Development Convention (No. 142), and Recommendation (No. 150), 1975*, ILC, 78th Session, 1991, Report III (Part 4B). See also: *Adjustment and Human Resources Development*, ILC, 79th Session, 1992, Report VI.

wages for the normal hours not worked, financed by methods appropriate under national law and practice".

320. Paragraphs 21 and 22 reflect the principle whereby, when an employer is faced with economic difficulties or when he is obliged to introduce technological or other changes, he should only use termination of employment as a last resort as a means of solving these problems, and he should first consider all other possible measures that would allow him to avoid terminations. Such measures are often in the interests of the enterprise, as they make it possible to safeguard the sometimes considerable investment represented by the staff's skills and experience. The two types of measures put forward in the Recommendation consist of reducing the workforce in a voluntary manner and work sharing, with these measures being combined in most cases. The Recommendation offers a choice of measures that could be taken and which reflect the measures adopted in some countries at the time the instrument was being drafted. Given the persistence of unemployment in the interim, other methods of minimizing termination of employment have been designed and incorporated into national law and practice. [69]

321. With regard to work sharing, the Recommendation refers to the restriction of overtime and reduction of normal hours of work. Since the adoption of the instruments in 1982, the concept of the reduction of normal hours of work (as a result of economic developments) has been broadened to include work sharing, and in particular part-time work (sometimes as a result of economic developments, but often freely chosen by the worker).

322. With regard to Paragraph 22, it was observed during the preparatory work that by paying partial compensation for temporarily reduced hours of work employers could save themselves the cost of severance allowances, and the recruitment and training costs of subsequently hiring new workers. Reference was also made to a system of state compensation in the event of short-time work which exists in several countries and allows employers to avoid the expenses involved in terminating the employment of workers. [70]

323. The natural reduction of the workforce by means of limiting recruitment and spreading the reduction over a sufficient period to allow natural reduction to bring the workforce down to the desired level means terminations of employment can be avoided. This matter should however be looked at in the light of specific circumstances. In *Poland*, for example, this method appears to

[69] For example: *Cameroon*: s. 40 of the Labour Code of 1992: reduction of hours of work, working on a rota system, part-time work, lay-offs, readjustment of allowances, compensation and benefits of all kinds, and even the reduction of wages.

[70] ILC, 68th Session, 1982, *Record of Proceedings*, p. 30/17.

have played an important role in reducing the workforce.[71] One government stated that vacant jobs should be eliminated first.[72]

324. Internal transfers are another way of limiting the number of terminations of employment. Rapidly changing technology generally means that such transfers go hand in hand with training and retraining measures to allow workers who have been transferred to adapt to their new jobs.

325. When the Recommendation was adopted, the legislation of some countries made provision for finding alternative employment, which was also the subject of negotiation between the social partners. As pointed out by the Committee, its importance was recognized in the Convention, which emphasizes the finding of alternative employment as one of the measures to be considered in the consultation with workers' representatives with a view to averting or minimizing the terminations and mitigating their effects.[73] Alternative employment is now recognized in the legislation and collective agreements in some countries as an essential component of measures to limit terminations of employment. In some cases, the obligation to find alternative employment was established in case-law before being incorporated into legislation.[74] Training and retraining also allow workers to adapt to the new demands of their jobs when these are modified.

326. As recruitment restrictions and natural reduction are often not sufficient to bring about a reduction in the workforce, early retirement, encouraged by means of higher severance allowances and financial benefits, has become one of the main methods of limiting terminations of employment. Provision is frequently made for such measures in collective agreements. In accordance with the Recommendation, early retirement should not be imposed on the worker, but should be of a voluntary nature. In some countries, workers who take early retirement receive an allowance until the normal date of their entitlement to a full pension. This allowance makes up for the difference between their previous remuneration and their combined unemployment and early retirement benefits. Early retirement systems help to safeguard the viability of the enterprise and therefore to save jobs. Nevertheless, although they can be useful during periods of cyclical unemployment, during periods of long-term structural unemployment they can be costly in terms of public finance and the financial balance of retirement funds.

327. One of the first measures employers can apply to avert terminations of employment is to reduce overtime. The reduction of normal hours of work

[71] ILO, Interdepartmental project on structural adjustment: *Public sector adjustment through employment: Retrenchment policies and practices in Poland*. Occasional paper No. 20, Geneva, 1993, p. 32.

[72] *Azerbaijan*: Regulations for Dismissal and Hiring Procedures.

[73] See above, para. 282.

[74] For example *France*: the dismissal of a worker for economic reasons can only take place in the event of workforce reductions if it is not possible to find alternative employment for the person concerned (*Cass. Soc.*, 1 Apr. 1992).

is another way of averting terminations. Reductions of this kind are sometimes negotiated on an ad hoc basis where unexpected difficulties arise in the enterprise. They are also becoming an increasingly common subject of regular negotiations between the social partners as part of a more general approach to the issue of hours of work and work sharing.

328. The measures mentioned by governments generally consist of alternative employment, training, reduction of hours of work or early retirement. In *Azerbaijan*, where vacant jobs must be eliminated first of all, the employer is obliged to find the worker alternative employment in the enterprise or, with his consent, through a transfer to another enterprise. In the *Republic of Korea*, the employer has to make efforts to rationalize his management and working methods and to avoid terminations of employment by means of early retirement and transfers to other jobs. In *New Zealand*, the courts consider that the employer should consider alternative options to termination of employment, such as redeployment, training, transfers or early retirement. In *Finland*, the possibilities of both alternative employment in the enterprise and training have to be considered. Similarly, in *Romania*, the employer has to take the necessary steps, where appropriate, to help the worker acquire new skills.

329. Shorter hours of work as part of employment policy instruments are beginning to be more widely discussed in collective bargaining. A striking example is the agreement concluded in 1993 in *Germany* within the Volkswagen group, where the enterprise agreed not to carry out any collective terminations of employment for two years, but to reduce working time (the introduction of a four-day week) with a wage reduction, although the current monthly income is still guaranteed (by adding negotiated wage increases and various bonuses to the basic wage).

330. In *France*, the Government is advocating a different balance between working time and income and, more generally, there is evidence of a new solidarity in response to unemployment. Emphasis is being placed on measures to relax hours of work regulations, as well as the introduction of long-term shorter hours of work with compensation, and part-time work. Moreover, those workers whose employment situation is most precarious because of their skill profile, age or disability have to be the first to benefit from alternative employment.[75] In *Mali*, the legislation provides for measures such as the reduction of hours of work, working on a rota basis and short-time work. In *Niger*, enterprises that have carried out staff reductions are not permitted to have recourse to overtime until they are back to their previous staff numbers.

331. In several countries, provision is made for compensation for loss of earnings in the event of reductions in hours of work. For example, in *Finland*, between March 1994 and December 1995, workers who voluntarily consent to work part time receive compensation for their loss of income, a prior condition being that the employer should hire an unemployed person for the other part-

[75] *France*: circular dated 7 June 1994.

time post. In *Portugal*, workers also receive compensation for loss of earnings in the event of suspension or a temporary reduction of hours of work. Similarly, in the *Czech Republic*, special subsidies are paid to employers who avoid terminations of employment by reducing hours of work to 90 per cent. These subsidies are intended to partially compensate loss of earnings. In order to avoid terminations of employment and allow workers to be transferred to other jobs, employers in this country may receive total or partial compensation for any expenses incurred. In *Slovenia*, under certain circumstances, workers can also receive compensation for loss of earnings.

332. In *Belgium*, many collective agreements concluded by joint committees include clauses providing that everything possible should be done to avoid terminations of employment. For example, in the chemical industry, the joint committee has drawn up a list of alternatives: early retirement, work sharing, career interruptions and the application of legislation regulating temporary work. The National Labour Council adopted a collective agreement on bridging pensions (No. 17) and this subject has been dealt with in a number of collective agreements at all levels. [76] In *Austria*, flexible pensions are offered *(Gleitpension)* along with early retirement.

333. In *Peru*, in addition to temporary total or partial suspension of work, measures can include a reduction of shift work or working days or hours, changes in working conditions, the revision of collective agreements on any other measures likely to contribute to the continuation of activities at the workplace. [77]

Criteria for selection for termination

334. Paragraph 23 of the Recommendation provides that "(1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers. (2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation".

335. When measures to avert and minimize terminations of employment are not sufficient to solve the difficulties and the employer is forced to terminate certain contracts, it is important for the choice of the workers to be affected by this measure to be made as objectively as possible in order to avoid any risk of reaching arbitrary decisions. If these criteria are established in advance, as advocated in the Recommendation, the risk of arbitrary measures is reduced. In particular, it is important to ensure that certain protected workers, such as workers' representatives, are not dismissed in an arbitrary manner on the pretext

[76] See also, Royal Order of 30 July 1994 on part-time early retirement.

[77] *Peru*: s. 88 of the Employment Promotion Act of 1993.

of a collective termination of employment. It is for appeal bodies to ensure that these selection criteria are respected.

336. The selection criteria are determined in many countries by legislation, while in others the matter is left to collective bargaining or enterprise rules. Given such diversity, when the Recommendation was adopted it was decided that considerable flexibility should be allowed in this respect in order to take account of the diverse situations.

337. The criteria most often applied relate to occupational skills, length of service, family circumstances, with preference sometimes being given to a particular criterion. [78] Other criteria may be included, such as the difficulty of finding alternative employment. [79] In some countries, the main criterion is length of service. [80] In other countries, the focus is more on the protection of more vulnerable categories of workers. [81]

338. The governments of several countries which have no legislative provisions regarding selection criteria stated that, as far as trade union members

[78] For example: *Benin*: s. 33 of the Labour Code: length of service, occupational skills, family circumstances; *Bulgaria*: skills; in the case of equal skills, advantage is given to workers with more difficult family, marital or health status; the first to have their employment terminated are retired persons who are working and workers who are entitled to a full pension; *Croatia*: efficiency, special skills, level of skills, length of service, social status; *Ethiopia*: s. 29 of Labour Proclamation No. 42/1993: skills and productivity; in the case of equal skills and productivity, workers are made redundant in the following order: those with a shorter length of service, those with fewer dependants, disabled persons, workers' representatives, pregnant women; *Mali*: s. 48 of the Labour Code: capacity; in the case of equal capacity, those with longer length of service will be kept on, length of service being increased on the basis of family responsibilities; similar provisions apply in *Senegal*: s. 47 of the Labour Code; *Mexico*: length of service; *Morocco*: length of service and family responsibilities; *Panama*: length of service; then other criteria such as efficiency, trade union membership, nationality. Pregnant women and trade union representatives also benefit from special protection; *Tunisia*: professional capacity, family responsibilities, length of service (in practice older workers are the first to be affected if they meet the conditions for early retirement).

[79] For example: *France*: s. L.321-1-1 of the Labour Code (family responsibilities, in particular single parents, length of service, situation of workers whose social characteristics make finding alternative employment particularly difficult, in particular disabled persons and older workers, professional capacity being divided into categories).

[80] *Portugal*.

[81] *Belarus*: s. 34 of the Labour Code of 1992: in the case of equal productivity and skills, preference is given to workers who helped to eliminate the effects of the Chernobyl disaster, to people working in the evacuation zone, to disabled persons and other workers, as determined by collective agreement; furthermore, disabled persons working in establishments providing training to other disabled persons or encouraging the employment of disabled persons in other enterprises have an exclusive right to keep their jobs, irrespective of their productivity or skills. In *Latvia*, among other criteria, preference is also given to workers who helped to eliminate the effects of the Chernobyl disaster; to workers who have sustained an occupational injury or who suffer from an occupational disease related to their work in the enterprise; to disabled persons and those suffering from illnesses caused by radiation.

are concerned, such criteria are included in collective agreements.[82] In other countries, the legal authorities have referred to the need to establish fair and reasonable criteria.[83] It should also be noted that, even in countries where legislation lays down a certain number of criteria, the order in which terminations of employment are to take place is often established by collective agreement.[84] Workers' representatives in some countries enjoy priority,[85] or sometimes relative priority,[86] to retain their employment.

339. As the Committee has emphasized, the criteria applied should not be such as to jeopardize the protection provided in Articles 5 and 6 of the Convention.[87]

Priority of rehiring

340. Under the terms of Paragraph 24 of the Recommendation "(1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired. (2) Such priority of rehiring may be limited to a specified period of time. (3) The criteria for the priority of rehiring, the question of retention of rights — particularly seniority rights — in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation".

341. This provision is based on the idea that, where an employer who has had to reduce his staff for any of the reasons mentioned may later have to hire staff once again, out of fairness a certain priority should be granted to the

[82] For example: *Cyprus*: apart from a reference to Recommendation No. 119 in the Industrial Relations Code, there are no established criteria. In practice, if workers belong to trade unions, such criteria are established following consultations between the employer and the trade union representatives; *United States*: seniority is the main criterion; ability and attendance are also considered.

[83] *Republic of Korea*: decision of the Supreme Court dated 26 Jan. 1993 in the Samheung case: the employer must prove that he has established fair and reasonable criteria on the basis of which the person was selected; *New Zealand*: the criteria invoked must be objective and clearly communicated to the staff.

[84] *Italy*: the decision must be taken with regard to the requirements resulting from the production techniques and the organization of work in the enterprise, in accordance with criteria set out in previously concluded collective agreements; where there are no such agreements, the following criteria should apply: family responsibilities, length of service and requirements in connection with production techniques and the organization of work.

[85] For example: *Iceland*: all other things being equal, staff delegates have a priority with regard to keeping their employment.

[86] For example: *Ethiopia*.

[87] The Government of *Italy* has pointed out that the principle of non-discrimination set forth in Act No. 300 of 1970 limits the contractual freedom.

workers whose employment was previously terminated. The Recommendation is worded in very flexible terms: it refers to a "certain" priority which can be limited in its duration and which is only applicable if comparable qualifications are called for and if the worker has expressed an interest in being rehired. Furthermore, the right to be rehired is understood as referring to the hiring, by the employer, of workers with comparable qualifications. If these workers are replaced because the employer considers that they no longer have the necessary qualifications, he will no longer hire workers with those same qualifications. The Recommendation also limits the right to reinstatement for workers expressing a desire to be rehired to a given period from the time of their leaving. During the preparatory work, it was mentioned that workers may prefer to undergo training and take up new jobs rather than return to their old jobs and that it would therefore be advisable to ask workers their intentions within a certain time after their employment has been terminated.

342. The legislation in many countries establishes the principle of priority of rehiring, when the employer takes on staff once again,[88] for workers who have had their employment terminated for economic, technological, structural or similar reasons. In other countries, the principle is included in collective agreements or other methods of implementation.[89] It is generally specified that priority goes to workers with comparable qualifications,[90] the same occupational category[91] or both.[92] Sometimes priority is not restricted to jobs requiring comparable qualifications, but also extends to jobs which correspond to the new qualifications that the worker may have acquired, on condition that the employer has been kept informed.[93] The worker should usually have informed the employer, within a given period from the time of the termination of employment, of his desire to be rehired if jobs become vacant.[94] Furthermore, priority lasts for a specified limited period[95] generally varying between six months and a year. The criteria for the priority of rehiring, when established, are sometimes based on the reverse order in which employment has

[88] For example: *Benin*; *China*: s. 27 of the Labour Law; *Cyprus*: s. 22 of the Termination of Employment Law; *Dominica*: s. 140 of the Protection of Employment Act; *Finland*; *France*: Labour Code; *Mali*: Labour Code; *Morocco*; *Sri Lanka* (information provided by the trade union Lanka Jathika Estate Workers' Union); *Tunisia*: s. 9 of the Labour Code.

[89] For example: *United States*: collective agreements in the automobile and communications industries: these provide for re-employment assistance; *United Kingdom (Montserrat)*: the Government stated that rehiring is a general practice, but not a legal requirement.

[90] For example: *France*.

[91] For example: *Benin, Mali, Tunisia*.

[92] For example: *Cyprus*: same job and same qualifications.

[93] For example: *France*.

[94] For example: *France*: four months; *Poland*: one year; *Tunisia*: there are many ways of proving that a request has been made, including presentation of the receipt issued upon dispatch of a registered letter.

[95] For example: six months: *China*; one year: *France, Lebanon, Tunisia*; two years: *Benin*.

been terminated, length of service or other factors.[96] In some countries, when terminations of employment take the form of lay-offs, the laid off workers are entitled to be rehired on a priority basis.[97]

343. The information provided by governments gives little indication as to the retention of seniority rights or wage levels of the rehired workers. In the event of lay-offs, it would seem that collective agreements often provide for the retention or accumulation of seniority rights.

Mitigating the effects of termination

344. Under the terms of Paragraph 25 of the Recommendation: "(1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned. (2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers. (3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975."

345. Paragraph 25 is drafted in flexible and general terms and expresses the basic principle that the placement of workers should be encouraged. The main responsibility for helping workers in this area falls upon the competent authority, in collaboration with the employer and the workers' representatives where possible (subparagraph 1). The intention of this text is not to impinge upon the role of employment services, as is clear from the expression "where possible". The aim is to introduce a degree of tripartite participation in the search for ways of mitigating the effects of terminations of employment. In view of the difficulty of imposing strict obligations in this respect, some flexibility was left for countries where public employment services play a predominant role.[98] Subparagraph 2 recognizes the fact that the employer can sometimes play a considerable independent role in helping workers find alternative employment.

346. Under the terms of Paragraph 26 of the Recommendation "(1) with a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a

[96] For example: *Tunisia*: length of service, with each child of less than 6 years of age at the time of termination entitling the worker to an increase of one year.

[97] For example: *Colombia*: s. 66 of Act No. 5/1990: where work has been suspended or temporarily stopped, workers who have been laid off are the first to be reinstated.

[98] ILC, 67th Session, 1981, *Record of Proceedings*, p. 33/25.

change of residence". The Recommendation specifies that "(2) the competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of the Paragraph, in accordance with national law and practice".

347. Paragraphs 25 and 26 are based on the fundamental principle that workers who lose their employment for reasons beyond their control should not suffer unduly from the consequences and the community should bear part of the burden of avoiding this by sharing in the risks associated with economic change and the costs of redeploying workers. The Paragraphs aim to mobilize the efforts of the authorities with the collaboration of employers and workers' representatives, where possible, in order to find a new job for workers whose employment has been terminated for economic, technological, structural or similar reasons. The effective application of these Paragraphs depends on training and retraining measures, which can only be effectively designed as part of a vigorous policy directed towards full employment.

348. The information communicated by governments does not give a complete picture of the efforts made at the national level. The governments that provided information mainly referred to training and retraining programmes, sometimes financed by public funds.[99] Some governments specified that persons who participate in training and retraining courses receive financial assistance, and that jobseekers can receive financial assistance when seeking employment or when they change residence in order to take a job.[100] In one country, recent provisions established procedures and conditions for the provision of assistance for geographical mobility, re-employment, enterprise creation and the creation of socially and economically useful jobs.[101] In another country, various measures have been adopted to help people who lost their jobs as a result of an electricity power crisis.[102]

349. With regard to the assistance that the employer should, in accordance with the Recommendation, give the worker in seeking suitable alternative employment, one government referred to an agreement between occupational

[99] For example: *Austria; Finland; New Zealand; United States*: there are some 150 training programmes at the federal level and several dozen at the state level. The Job Training Partnership Act (JTPA) programme is the most important.

[100] For example: *Croatia, Cyprus, Finland, New Zealand* (Job Plus programme).

[101] *Luxembourg*: Grand-ducal Order, dated 17 June 1994.

[102] *Philippines*: Act No. 7654 of 14 June 1993.

organizations concerning subcontracting [103] and another to a collective agreement on outplacement. [104]

[103] In *Finland*, there is no legal obligation upon the employer to help the worker look for alternative employment. However, the Confederation of Finnish Industry and Employers (STK) and the Central Organization of Finnish Trade Unions (SAK) have concluded an agreement on the use of outside workers, providing that if the workforce of an enterprise must be reduced due to subcontracting, the enterprise must try to place the redundant workers in other work in that enterprise and, if that is not possible, ask the subcontractor, if he needs labour, to employ the workers with their former pay conditions.

[104] In *Belgium*, collective agreement No. 51, dated 10 Feb. 1992, establishes a legal framework for outplacement measures. These are defined as a combination of services and guidance counselling provided individually or to groups by a third party, called an outplacement office, in exchange for payment and upon request by an employer in order to permit a worker to find employment with a new employer as rapidly as possible or to develop an activity as a self-employed person. This agreement lays down a number of principles: the worker's consent, the cost of outplacement being the employer's responsibility, the obligations of the outplacement office, informing and consulting workers' representatives, and the neutrality of this system as far as termination of employment rules are concerned. See also, ILC, 81st Session, Geneva, 1994, Report VI, "The role of private employment agencies in the functioning of labour markets", p. 18.

CHAPTER VIII

Difficulties of application and prospects for ratification

350. General Surveys have become a real reference tool for appreciating the state of national law and practice in a particular field and for the identification of difficulties in the application and ratification of ILO instruments. [1] However, they have not yet reached the stage of being the vehicle for evaluation that they could become, since sufficient information is not always supplied. Indeed, in the case of this survey, only a certain number of governments have supplied full information on difficulties of application and their intentions as regards ratification. The Committee has examined this information and hopes that henceforth the report form concerning article 19 of the Constitution will contain questions, the replies to which would enable the Committee to develop general surveys into the "ideal vehicle for evaluation" that they should be, as suggested by the Director-General in his recent Report to the Conference. [2]

Difficulties of application

351. A certain number of governments indicated that legal or practical difficulties in the application of the Convention were preventing its ratification. [3]

352. The Government of *Denmark* stated that the issue of termination of employment is principally governed by collective agreements and that it does not consider it possible to ratify the Convention, which it believes would imply the adoption of legislation on termination of employment. The Committee recalls in this respect that by virtue of *Article 1* of the Convention, it can be applied, among other means, by collective agreements (or in such other manner as may be consistent with national practice). It has to be given effect through national legislation in so far as it is not otherwise made effective by other means.

353. The Governments of *Canada* (Province of Quebec), *China, Germany, Kuwait, Lebanon* and *Mauritius* referred to problems related to the application

[1] As regards this question, see GB.262/LILS/3, paras. 44 et seq.

[2] ILC, 81st Session, 1994, Report of the Director-General, *Defending values, promoting change*, Ch. 3, "Standards: A broader approach", p. 49.

[3] Or a declaration of its application to non-metropolitan territories.

of *Article 2* of the Convention. The German Government mentioned problems related to the exclusion of small enterprises from the scope of national legislation respecting protection against termination, the special situation of religious institutions and the required qualifying period.[4] The Committee refers in this respect to the flexibility clause contained in Article 2, paragraph 5, by virtue of which "in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or *the size or nature of the undertaking that employs them.*" The Government of *Kuwait* mentioned that it is not able to ratify the Convention because its Labour Code does not exclude workers engaged for a specific period of time or for a specified task as envisaged under Article 2, paragraph 2(a). The Committee would like to point out that Article 2, paragraph 2(a), merely gives option to the employer to exclude these categories of workers and does not make it mandatory to do so and therefore the Labour Code of *Kuwait* does not seem to be in any way inconsistent with Article 2, paragraph (a), of the Convention. The Government of *Mauritius* noted that the provisions of the instruments are currently only applicable to the private and semi-public sectors and considers that they should be extended to the public sector before ratification. In this respect, the Committee draws attention to the flexibility clause contained in Article 2, paragraph 4, of the Convention under which "in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention." As noted by the Committee in Chapter II of this survey,[5] the possibility of excluding these categories of employees is intended principally for public officials.

354. Certain governments mentioned difficulties relating to *Articles 4, 5 and 6* of the Convention. These were the Governments of *Austria* (Articles 4, 5(c) and (d)); *Canada* (Province of New Brunswick, Article 6; Province of Ontario, Article 4); *China*, Article 5; *Germany*, Article 5(c), (d) and (e), Article 6; and the *United Kingdom*, Article 5(c), (d) and (e), Article 6. In relation to Article 5(c), (d) and (e), the British Government referred to the requirement contained in the law (with certain exceptions based on race (Great Britain), religious belief, political opinion (Northern Ireland), sex, marital status, membership or non-membership of a trade union and trade union activities,

[4] With regard to the required qualifying period, see para. 354 below.

[5] See above, Ch. II, paras. 63-64.

pregnancy, rights related to employment and "victimization") of a qualifying period, generally of two years, in the service of the same employer in order to be able to have recourse to the competent court. During the preparatory work, in response to the replies received from governments, it was considered that it was for each country to determine the periods that are considered reasonable, subject to the requirement that this determination be made in good faith. [6] The requirement of an excessively long qualifying period could have the effect of depriving workers of the protection set out in the Convention.

355. The Governments of *Austria, Canada* (Provinces of New Brunswick, Ontario and Quebec), *Germany, Mexico, United Kingdom* and *Uruguay* referred to difficulties arising out of the absence of any provision in their national law providing workers with an opportunity to defend themselves before their employment is terminated, in accordance with *Article 7* of the Convention. However, the German Government noted that in practice employers in Germany give employed persons an opportunity to express their point of view in the event of termination of employment on grounds of their conduct or work performance, and in certain specific cases the employer is even obliged to give the worker the opportunity of an interview. In these circumstances, the Committee considers that, in view of the flexibility of the Convention as regards the means by which it may be given effect, it may be presumed that the Convention is made effective "in such other manner as may be consistent with national practice", as envisaged in Article 1 of the Convention. The Uruguayan Government referred to collective agreements which establish joint commissions as conciliation and mediation bodies. The Committee considers that, if the conciliation and mediation bodies are empowered to provide the worker concerned with an opportunity to defend himself or herself *before* a decision is taken to terminate the employment, national practice would be in conformity with the Convention with regard to this Article.

356. Problems of application in relation to *Articles 8 to 10* of the Convention were mentioned by the Governments of *Canada* (Province of Quebec), *China* (Articles 9 and 10), *Ecuador* (Article 9, paragraphs 3 and 10), *United Kingdom* (Articles 8 and 9, paragraph 2(a)) and *Uruguay* (Articles 8 to 10). With regard to Article 9, paragraph 2(a), the British Government considers that it amounts to reversing the burden of proof. The Committee wishes to emphasize that the Convention offers a choice between several possibilities: one of these is contained in Article 9, paragraph 2(a), under which the burden of proof rests with the employer. However, the Convention offers another possibility, contained in Article 9, paragraph 2(b), under which bodies of appeal shall be empowered to reach a conclusion having regard to the evidence provided by the parties. National machinery may also provide for both of the above possibilities. The Committee hopes that the Governments of the above countries will re-examine this question.

[6] ILC, 68th Session, 1982, Report V(2), p. 16.

357. The absence of a requirement to give notice, in accordance with *Article 11*, was mentioned by the Governments of *Mexico* and *Uruguay*. The German Government referred to difficulties relating to the interpretation of the concepts of "notice" and "compensation in lieu thereof" and wondered whether the employee was entitled to choose between the two alternatives. In this respect, reference may be made to the preparatory work leading up to the adoption of the text of Article 11. The secretariat indicated in response to a question by a Government member that inclusion of an alternative was based on the observation that in certain countries the legislation offers employers a choice between giving notice and paying the remuneration which would have been due, while in other countries employers are required to give notice and the non-observance of this obligation is penalized by the payment of compensation.[7] It would therefore appear that the choice available to the employer was the factor which was taken into consideration.

358. *Article 12* of the Convention was cited as being an obstacle to ratification or as giving rise to difficulties in the application of the Convention by the Governments of *Ecuador, Kenya, Kuwait, Madagascar, Mexico, Suriname* and *Swaziland*. The Committee considers that it should be pointed out, as indicated in Chapter VI,[8] that the means by which the Convention is given effect at the national level may include the payment to the worker whose employment has been terminated of a severance allowance or other separation benefits (Article 12, paragraph 1(a)), or benefits from unemployment insurance or assistance, or other forms of social security, such as old-age or invalidity benefits (paragraph 1(b)), or a combination of such allowance and benefits (paragraph 1(c)). By virtue of the flexibility contained in the Convention (Article 12, paragraph 2), in the case that a worker does not fulfil the qualifying conditions for benefits under unemployment insurance or assistance, the worker may not claim the severance allowance or other benefit referred to in Article 12, paragraph 1(a), solely because she or he is not receiving an unemployment benefit.

359. The absence or inadequacy of consultancy and notification procedures, in accordance with the requirements of *Articles 13 and 14* of the Convention, were mentioned by the Governments of *Barbados, Chile, Ecuador, New Zealand, Singapore* and *Uruguay*; the Governments of *Canada* (Province of Quebec), *Sudan, Suriname* and *Swaziland* only reported the absence of procedures in conformity with Article 13, and the Government of *Malta* noted the absence of provisions for the notification of the competent authorities, in accordance with Article 14. Nevertheless, certain of the above governments stated that workers are consulted in practice (*Singapore*), according to custom (*Sudan*) or as a result of the requirements of the courts (*New Zealand*). The Governments of *Sudan* and *Tunisia* stated that the legislation does not envisage

[7] ILC, 68th Session, 1982, Report V(1), p. 26. See also Ch. V above.

[8] See Ch. VI above, paras. 259-264.

a minimum period of time before carrying out terminations, as envisaged in Article 14, paragraph 3, of the Convention. The German Government referred to problems related to the exclusion from consultation procedures of enterprises employing fewer than 21 workers. In this respect, the Committee once again refers to the flexibility contained in Article 2, paragraph 5, of the Convention, which it mentioned above in the context of the possibilities offered for limiting the scope of the Convention.[9]

360. A number of governments referred to *general problems of application*. The Government of *Cambodia* mentioned the consequences of the civil war, while the Government of the *Central African Republic* referred to the current reorganization taking place following political changes. One Government referred to difficulties related to non-national workers (*Kuwait*). In this context, the Committee recalls that the technical assistance of the Office can be called upon with a view to overcoming in so far as possible difficulties of application of this type. Although time is clearly required before such difficulties can be resolved, it is essential to adopt the right approach as rapidly as possible.

361. Finally, at a more general level, the Committee would like to emphasize at this point, as the Government of one country did in its report (*Chile*), the value of the ILO's standards on tripartite consultation.[10] In the context of such consultations, these standards envisage "the re-examination at appropriate intervals of unratified Conventions and of Recommendations to which effect has not yet been given, to consider what measures might be taken to promote their implementation and ratification as appropriate". Even if member States have not ratified Convention No. 144, it would be desirable for them to bear these provisions in mind, quite apart from the requests for reports that they receive under article 19 of the ILO Constitution.

Prospects for ratification

362. As the Committee has already indicated, Convention No. 158, which came into force in November 1985, has been ratified, at the time this report was finalized, by 24 countries, of which half have been registered since 1990. However, there are also prospects for further ratifications, according to the information supplied by governments and reported below.

363. The Governments of *Comoros* and *Portugal* have proposed the ratification of the Convention to their Parliaments. The Government of *Botswana* considers that recommendations could be made to the competent authorities to this effect.

364. The Governments of *Indonesia, Iraq, Luxembourg* and *Swaziland* are examining the possibility of ratification.

[9] See para. 353 above.

[10] The Tripartite Consultation (International Labour Standards) Convention (No. 144) and Recommendation (No. 152), 1976.

365. The Governments of *Burkina Faso, Namibia* and the *Philippines* do not consider that there are any difficulties which might prevent ratification, while those of *Guinea* and *Senegal* have not pointed out any difficulties concerning the instruments. The Government of *Côte d'Ivoire* considers that its current law and practice give rise to no obstacles to ratification. According to the Governments of *Bangladesh, Benin, Hungary* and *Mali*, their legislation is in accordance with the Convention or its spirit and there would therefore no longer appear to be any obstacles to ratification.

366. The Governments of *Argentina, Belarus, Belize, Bolivia, Croatia, Egypt, Peru, Romania* and the *Russian Federation* reported that their legislation, and particularly their labour legislation and law respecting industrial relations, employment and supervisory procedures, are undergoing revision and that they currently preferred to postpone the question of the ratification of the Convention.

367. The Governments of *Ecuador, Norway, Syrian Arab Republic* and *United States* do not currently envisage the ratification of the Convention.

368. A number of governments refer to amendments which have been adopted or are envisaged, some of which are of a specific nature, and others are more general, which would make it possible to bring the national legislation closer to the standards contained in the Convention and the Recommendation. Information on modifications of this type were transmitted, among others, by the Governments of *Austria, Azerbaijan, Canada* (Provinces of British Columbia and Quebec), *Dominica, Equatorial Guinea, Estonia, Grenada, Guinea, Lebanon, Madagascar, Malta, Mauritius, Namibia, Norway, Philippines, Poland, Republic of Korea, Romania, Russian Federation, Seychelles, Slovak Republic, Thailand, Tunisia* and *Zimbabwe*.

369. However, other Governments indicated that the legislation has not been modified or that it is not planned to modify it: *Bangladesh, Belgium, Botswana, Bulgaria, Canada* (Province of Alberta), *Central African Republic, Cuba, Ecuador, Germany, Ghana, Guinea, Indonesia, Iraq, Kuwait, Mexico, New Zealand, Panama, Peru, Qatar, Saudi Arabia, Singapore, Sri Lanka, Suriname* and *United Kingdom*.

370. The Committee notes that in most of the cases examined the ratification of the Convention would not appear to be a social objective which is impossible to achieve. Indeed, the absence of prospects for its ratification would appear to be more the result of specific situations than opposition in principle to the minimal protection afforded by the Convention. Moreover, the Committee is pleased to note that a number of States could ratify the Convention in the relatively near future. It hopes that this will be done.

FINAL REMARKS

371. The Committee welcomes the selection by the Governing Body of the Termination of Employment Convention (No. 158) and Recommendation (No. 166) as the subject of a general survey. Adopted by the International Labour Conference in 1982, these instruments have lost none of their relevance, particularly in the current situation, in view of the importance of their subject-matter, the manner in which they approach the various aspects of the issue of employment protection, and the sometimes very large scale job losses produced by certain national adjustment programmes and the restructuring of enterprises made necessary by the globalization of the economy.

372. The standards on termination of employment have a twofold objective: to protect workers in their professional life against any *unjustified* termination of employment, while preserving the right of employers to terminate the employment of workers for reasons which are recognized as being valid. Under the terms of Convention No. 158, to be valid the reason has to be connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service. The Convention provides for procedural guarantees, namely the right of the worker to be heard prior to or at the time of termination, procedures of appeal against termination, the right to a period of notice and, in the case of terminations of employment for economic, technological or similar reasons, the consultation of workers' representatives and notification to the competent authority of the terminations of employment contemplated. It also deals with compensation in the event of *unjustified* termination of employment and income protection.

373. Although setting out a number of substantive principles, the Convention is very flexible as regards the methods of its implementation. The Convention gives States which have ratified it the choice between various methods of giving effect to its provisions consistent with national practice, taking into account differences at the national level in the way in which relations between employers and workers are regulated, thereby permitting broad flexibility of the instrument. It can be made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice. If these methods do not suffice to ensure the application of the Convention, it has to be given effect by national laws or regulations. The Committee emphasizes that whatever methods are chosen they have to be general in scope and apply to labour relations as a whole. The flexibility of the Convention also applies to: (a) the persons covered (exclusions are possible based on the nature of the contract of employment and

the category of workers concerned); (b) the procedure prior to termination of employment and the procedure of appeal (the Convention envisages the possibility of placing the burden of proof on the employer or empowering impartial bodies to reach a conclusion having regard to the evidence provided by the parties, and also provides that the remedy for unjustified termination may take the form of reinstatement or compensation); (c) the methods of income protection (by leaving the choice, in accordance with national law and practice, between a severance allowance and/or unemployment benefit); and (d) the procedures for the consultation of workers' representatives and notification to the competent authority (which may be limited to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce). Nevertheless, the Committee recalls that it is important to ensure that the use of these possibilities does not result in avoidance of the protection provided by the Convention or the undue limitation of the scope of the Convention.

374. The survey shows that the principle whereby workers should be protected against *unjustified* termination of employment is now accepted in many countries but this protection is not always complete due to limitations of scope as regards the persons covered and of the reasons that are considered not valid. Nevertheless, the Committee notes that protection against termination of employment for certain specific reasons, such as protection against reprisals or protection against reasons of a discriminatory nature, has increased markedly over recent years. Similarly, protection against termination of employment during pregnancy or maternity leave now appears to be provided in the legislation of a greater number of countries. The Committee must emphasize that these specific types of protection are indeed very important, nevertheless they should be considered complementary measures to the more general guarantees against *unjustified* termination of employment contained in Article 4 of the Convention, which establishes the general principle that any termination of employment has to be based on a valid reason.

375. With regard to consultation and notification procedures in the event of terminations of employment for economic, technological, structural or similar reasons, the Committee notes with interest that a large number of countries which submitted reports have established such procedures, which bears witness to the concern of their authorities for social justice and their desire to promote harmonious labour relations. The effectiveness of these procedures depends largely on the labour relations situation, the better are labour relations the more effective these procedures would be. Their effectiveness also depends on the existence of an active employment policy. The Committee notes in this respect that, when examining the General Survey on the Termination of Employment Recommendation, 1963 (No. 119), the Committee on the Application of Standards of the International Labour Conference commented that "the employment situation, as well as questions of employment promotion and policy, were mentioned again and again, because of the role they play in providing the overall setting and background to protection against dismissal and because

security of employment forms a fundamental aspect of the right to work". [1] The Committee concurs with these views expressed in 1974 and considers that they are still highly relevant and applicable.

376. The economic and political changes which have occurred throughout the world since the adoption of Recommendation No. 119 in 1963, which led the Conference to adopt the instruments on termination of employment in 1982, have become broader and more rapid since then. Practically all countries are confronted by the problems of structural adjustment, unemployment (particularly long-term unemployment), underemployment and the need to raise levels of competitiveness, in the context of the increased globalization of the economy which is raising new challenges in the field of labour relations as well as of ILO standards. Flexibility has become the dominant theme and for some a fundamental requirement for achieving the necessary adjustment. The debate has also entered the fields of national and international labour law.

377. The protection of employment security has been and remains a central issue in the debate. In one approach stressing the market economy, criticism is principally directed against measures to suppress or restrict the freedom of the employer to terminate employment, the procedural time-limits that have to be observed and the compensation payable. It is alleged that the resulting increase in the cost of labour dissuades employers from recruiting workers and inhibits prompt reaction to changes. Moreover, the rigidity of some protective measures is criticized as prejudicing productivity and the mobility of workers. In other words, the constraints and costs of protecting employment are said to have a negative effect on the efficiency of production and employment.

378. Clearly, the real impact of these constraints depends on the rigour with which security of employment is regulated at the national level. It is difficult to assess how rigorous the provisions are, such is their complexity and variety. While in certain countries, particularly those where unemployment insurance does not exist or is insufficient to provide alternative protection, a high level of protection provided by the law is dissuasive, the situation appears to be different in other cases. As shown by a document of the International Labour Office, [2] in most countries the protection provided through legislation and negotiation is confined to the imposition of standards of equity and to the provision of a level of minimum protection which does not generally go beyond the protection contained in ILO standards. Although there is no empirical basis for drawing links of causality between the protection of employment security and the overall level and structure of employment and unemployment, the ILO document concludes that there are nevertheless good reasons for believing that the more usual, moderate approach to the protection of employment security tends to limit job losses through unjustified terminations of employment and to moderate reductions of the workforce for economic reasons, while at the same

[1] ILC, 59th Session, 1974, *Record of Proceedings*, p. 525.

[2] *Industrial relations and employment*, Governing Body Committee on Employment and Social Policy, Geneva, GB.262/ESP/1.

time making a positive contribution to productive efficiency and the innovative capacity of enterprises. These in turn contribute to improving competitiveness and raising the possibility to recruit workers. Any analysis of the costs and benefits of protection also has to be made at the macroeconomic level. Redundancies undoubtedly constitute a social cost for the community, which includes unemployment compensation (and also the costs related to the loss of skills of the unemployed person), whereas an adequate level of protection against unjustified termination of employment contributes to a certain extent to macroeconomic stability.

379. Finally, recent works by the ILO shed light on the relationship between flexibility and stability. Stability of labour and employment relations, particularly in view of the incentive for employers to invest in human resources and for workers to accept change and mobility, instead of being an obstacle to structural adjustments, tends to favour them. Stability and flexibility are mutually interdependent.[3] The Committee emphasizes that the appropriate protection against unjustified dismissal is in principle not inconsistent with new forms of employment relations that allow enterprises to adjust their human resources to changing economic environment.

380. When the 1982 instruments were adopted, it was emphasized that they constitute a coherent and harmonious combination of three elements: the universal principles of justice and equity, institutions and procedures. They set out *a minimum level of protection* to be provided throughout the world which is necessary for all workers. The Committee hopes that it has shown in its survey that the various arguments put forward concerning the allegedly absolute prohibition of the termination of employment and the constraints and so-called high costs of dismissal are not the necessary consequence of compliance with the obligations deriving from the ratification of Convention No. 158. Indeed, the Convention explicitly authorizes termination of employment for economic, technological, structural or similar reasons, which makes it possible for enterprises to adapt rapidly to changes in the economic, national and international situation. However, these terminations of employment, which may affect a considerable number of workers, have to be carried out in conditions under which enterprises (the main source of job creation in a market economy) can survive and develop and which at the same time guarantee workers a minimum level of protection of their employment security. The Convention appears to be perfectly adapted to achieving these two seemingly irreconcilable objectives.

[3] *Creating economic opportunities*, ILO, Geneva, 1994. See also, on the same lines, the analysis made by the ILO Report *World Employment 1995*, ILO, Geneva, 1995, which shows in particular that, in the industrialized countries "employment protection rules do not convincingly seem a barrier to hiring or firing" (p. 157) and that, more generally, "since labour market regulation conveys economic benefits, economic flexibility may crucially rely on the presence rather than the absence of labour market regulation" (p. 171).

381. Furthermore, the Committee wishes to draw attention to the importance of the measures advocated in the Recommendation which, although not legally binding, usefully supplement the Convention. They propose a preventive and also a promotional approach to the issue of employment protection. These measures are related to the supply and demand for labour, working time, training and the mobility of the workforce, as well as a certain quality of employment, and correspond to the provisions contained in several basic ILO instruments establishing overall policies, including the standards on employment policy, employment services, human resources development and collective bargaining. These Conventions are widely ratified, often by the same member States.

* * *

382. The Committee trusts that Convention No. 158 will achieve a wider level of ratifications, since these standards make up a coherent set of provisions which may be considered as the means of reconciling the achievement in practice of the promotion of the *right to work*, which requires the creation of employment in particular by financially healthy enterprises, and the minimum protection afforded by *labour law*, which implies a universal level of protection for workers, both of which are essential for promoting the interest of the society. The Committee also wishes to emphasize that the implementation of the Convention will have a positive effect on the social peace and productivity at the enterprise level and the reduction of poverty and social exclusion, leading to social stability.

APPENDIX I

Text of the substantive provisions of Convention No. 158 and Recommendation No. 166

Termination of Employment Convention, 1982 (No. 158)

PART I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

Article 1

The provisions of this Convention shall, in so far as they are not otherwise made effective by means of collective agreements, arbitration awards or court decisions or in such other manner as may be consistent with national practice, be given effect by laws or regulations.

Article 2

1. This Convention applies to all branches of economic activity and to all employed persons.

2. A Member may exclude the following categories of employed persons from all or some of the provisions of this Convention:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

3. Adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from this Convention.

4. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.

5. In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed

persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

6. Each Member which ratifies this Convention shall list in the first report on the application of the Convention submitted under article 22 of the Constitution of the International Labour Organization any categories which may have been excluded in pursuance of paragraphs 4 and 5 of this Article, giving the reasons for such exclusion, and shall state in subsequent reports the position of its law and practice regarding the categories excluded, and the extent to which effect has been given or is proposed to be given to the Convention in respect of such categories.

Article 3

For the purpose of this Convention the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer.

PART II. STANDARDS OF GENERAL APPLICATION

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Article 5

The following, inter alia, shall not constitute valid reasons for termination:

(a) union membership or participation in union activities outside working hours or, with the consent of the employer, within working hours;

(b) seeking office as, or acting or having acted in the capacity of, a workers' representative;

(c) the filing of a complaint or the participation in proceedings against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;

(d) race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

(e) absence from work during maternity leave.

Article 6

1. Temporary absence from work because of illness or injury shall not constitute a valid reason for termination.

2. The definition of what constitutes temporary absence from work, the extent to which medical certification shall be required and possible limitations to the application of paragraph 1 of this Article shall be determined in accordance with the methods of implementation referred to in Article 1 of this Convention.

DIVISION B. PROCEDURE PRIOR TO OR AT THE TIME OF TERMINATION

Article 7

The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.

DIVISION C. PROCEDURE OF APPEAL AGAINST TERMINATION

Article 8

1. A worker who considers that his employment has been unjustifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator.

2. Where termination has been authorized by a competent authority the application of paragraph 1 of this Article may be varied according to national law and practice.

3. A worker may be deemed to have waived his right to appeal against the termination of his employment if he has not exercised that right within a reasonable period of time after termination.

Article 9

1. The bodies referred to in Article 8 of this Convention shall be empowered to examine the reasons given for the termination and the other circumstances relating to the case and to render a decision on whether the termination was justified.

2. In order for the worker not to have to bear alone the burden of proving that the termination was not justified, the methods of implementation referred to in Article 1 of this Convention shall provide for one or the other or both of the following possibilities:

(a) the burden of proving the existence of a valid reason for the termination as defined in Article 4 of this Convention shall rest on the employer;

(b) the bodies referred to in Article 8 of this Convention shall be empowered to reach a conclusion on the reason for the termination having regard to the evidence provided by the parties and according to procedures provided for by national law and practice.

3. In cases of termination stated to be for reasons based on the operational requirements of the undertaking, establishment or service, the bodies referred to in Article 8 of this Convention shall be empowered to determine whether the termination was indeed for these reasons, but the extent to which they shall also be empowered to decide whether these reasons are sufficient to justify that termination shall be determined by the methods of implementation referred to in Article 1 of this Convention.

Article 10

If the bodies referred to in Article 8 of this Convention find that termination is unjustified and if they are not empowered or do not find it practicable, in accordance with national law and practice, to declare the termination invalid and/or order or propose

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reinstatement of the worker, they shall be empowered to order payment of adequate compensation or such other relief as may be deemed appropriate.

DIVISION D. PERIOD OF NOTICE

Article 11

A worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation in lieu thereof, unless he is guilty of serious misconduct, that is, misconduct of such a nature that it would be unreasonable to require the employer to continue his employment during the notice period.

DIVISION E. SEVERANCE ALLOWANCE AND OTHER INCOME PROTECTION

Article 12

1. A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:

(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

2. A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in paragraph 1, subparagraph (a), of this Article solely because he is not receiving an unemployment benefit under paragraph 1, subparagraph (b).

3. Provision may be made by the methods of implementation referred to in Article 1 of this Convention for loss of entitlement to the allowance or benefits referred to in paragraph 1, subparagraph (a), of this Article in the event of termination for serious misconduct.

PART III. SUPPLEMENTARY PROVISIONS CONCERNING TERMINATIONS OF EMPLOYMENT FOR ECONOMIC, TECHNOLOGICAL, STRUCTURAL OR SIMILAR REASONS

DIVISION A. CONSULTATION OF WORKERS' REPRESENTATIVES

Article 13

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;

(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be

taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

2. The applicability of paragraph 1 of this Article may be limited by the methods of implementation referred to in Article 1 of this Convention to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. For the purposes of this Article the term "the workers' representatives concerned" means the workers' representatives recognized as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

DIVISION B. NOTIFICATION TO THE COMPETENT AUTHORITY

Article 14

1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, he shall notify, in accordance with national law and practice, the competent authority thereof as early as possible, giving relevant information, including a written statement of the reasons for the terminations, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out.

2. National laws or regulations may limit the applicability of paragraph 1 of this Article to cases in which the number of workers whose termination of employment is contemplated is at least a specified number or percentage of the workforce.

3. The employer shall notify the competent authority of the terminations referred to in paragraph 1 of this Article a minimum period of time before carrying out the terminations, such period to be specified by national laws or regulations.

Termination of Employment Recommendation, 1982 (No. 166)

I. METHODS OF IMPLEMENTATION, SCOPE AND DEFINITIONS

1. The provisions of this Recommendation may be applied by national laws or regulations, collective agreements, works rules, arbitration awards or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions.

2. (1) This Recommendation applies to all branches of economic activity and to all employed persons.

(2) A Member may exclude the following categories of employed persons from all or some of the provisions of this Recommendation:

(a) workers engaged under a contract of employment for a specified period of time or a specified task;

(b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration;

(c) workers engaged on a casual basis for a short period.

(3) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application

of this Recommendation or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements, which as a whole provide protection that is at least equivalent to the protection afforded under the Recommendation.

(4) In so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Recommendation or certain provisions thereof other limited categories of employed persons in respect of which special problems of a substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.

3. (1) Adequate safeguards should be provided against recourse to contracts of employment for a specified period of time the aim of which is to avoid the protection resulting from the Termination of Employment Convention, 1982, and this Recommendation.

(2) To this end, for example, provision may be made for one or more of the following:

(a) limiting recourse to contracts for a specified period of time to cases in which, owing either to the nature of the work to be effected or to the circumstances under which it is to be effected or to the interests of the worker, the employment relationship cannot be of indeterminate duration;

(b) deeming contracts for a specified period of time, other than in the cases referred to in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration;

(c) deeming contracts for a specified period of time, when renewed on one or more occasions, other than in the cases mentioned in clause (a) of this subparagraph, to be contracts of employment of indeterminate duration.

4. For the purpose of this Recommendation the terms "termination" and "termination of employment" mean termination of employment at the initiative of the employer.

II. Standards of general application

Justification for termination

5. In addition to the grounds referred to in Article 5 of the Termination of Employment Convention, 1982, the following should not constitute valid reasons for termination:

(a) age, subject to national law and practice regarding retirement;

(b) absence from work due to compulsory military service or other civic obligations, in accordance with national law and practice.

6. (1) Temporary absence from work because of illness or injury should not constitute a valid reason for termination.

(2) The definition of what constitutes temporary absence from work, the extent to which medical certification should be required and possible limitations to the application of subparagraph (1) of this Paragraph should be determined in accordance with the methods of implementation referred to in Paragraph 1 of this Recommendation.

Procedure prior to or at the time of termination

7. The employment of a worker should not be terminated for misconduct of a kind that under national law or practice would justify termination only if repeated on one or more occasions, unless the employer has given the worker appropriate written warning.

8. The employment of a worker should not be terminated for unsatisfactory performance, unless the employer has given the worker appropriate instructions and written warning and the worker continues to perform his duties unsatisfactorily after a reasonable period of time for improvement has elapsed.

9. A worker should be entitled to be assisted by another person when defending himself, in accordance with Article 7 of the Termination of Employment Convention, 1982, against allegations regarding his conduct or performance liable to result in the termination of his employment; this right may be specified by the methods of implementation referred to in Paragraph 1 of this Recommendation.

10. The employer should be deemed to have waived his right to terminate the employment of a worker for misconduct if he has failed to do so within a reasonable period of time after he has knowledge of the misconduct.

11. The employer may consult workers' representatives before a final decision is taken on individual cases of termination of employment.

12. The employer should notify a worker in writing of a decision to terminate his employment.

13. (1) A worker who has been notified of termination of employment or whose employment has been terminated should be entitled to receive, on request, a written statement from his employer of the reason or reasons for the termination.

(2) Subparagraph (1) of this Paragraph need not be applied in the case of collective termination for the reasons referred to in Articles 13 and 14 of the Termination of Employment Convention, 1982, if the procedure provided for therein is followed.

Procedure of appeal against termination

14. Provision may be made for recourse to a procedure of conciliation before or during appeal proceedings against termination of employment.

15. Efforts should be made by public authorities, workers' representatives and organizations of workers to ensure that workers are fully informed of the possibilities of appeal at their disposal.

Time off from work during the period of notice

16. During the period of notice referred to in Article 11 of the Termination of Employment Convention, 1982, the worker should, for the purpose of seeking other employment, be entitled to a reasonable amount of time off without loss of pay, taken at times that are convenient to both parties.

Certificate of employment

17. A worker whose employment has been terminated should be entitled to receive, on request, a certificate from the employer specifying only the dates of his engagement and termination of his employment and the type or types of work on which he was employed; nevertheless, and at the request of the worker, an evaluation of his conduct and performance may be given in this certificate or in a separate certificate.

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Severance allowance and other income protection

18. (1) A worker whose employment has been terminated should be entitled, in accordance with national law and practice, to —

(a) a severance allowance or other separation benefits, the amount of which should be based, inter alia, on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers' contributions; or

(b) benefits from unemployment insurance or assistance or other forms of social security, such as old-age or invalidity benefits, under the normal conditions to which such benefits are subject; or

(c) a combination of such allowance and benefits.

(2) A worker who does not fulfil the qualifying conditions for unemployment insurance or assistance under a scheme of general scope need not be paid any allowance or benefit referred to in subparagraph (1) (a) of this Paragraph solely because he is not receiving an unemployment benefit under subparagraph (1) (b).

(3) Provision may be made by the methods of implementation referred to in Paragraph 1 of this Recommendation for loss of entitlement to the allowance or benefits referred to in subparagraph (1) (a) of this Paragraph in the event of termination for serious misconduct.

III. Supplementary provisions concerning terminations of employment for economic, technological, structural or similar reasons

19. (1) All parties concerned should seek to avert or minimize as far as possible termination of employment for reasons of an economic, technological, structural or similar nature, without prejudice to the efficient operation of the undertaking, establishment or service, and to mitigate the adverse effects of any termination of employment for these reasons on the worker or workers concerned.

(2) Where appropriate, the competent authority should assist the parties in seeking solutions to the problems raised by the terminations contemplated.

Consultations on major changes in the undertaking

20. (1) When the employer contemplates the introduction of major changes in production, programme, organization, structure or technology that are likely to entail terminations, the employer should consult the workers' representatives concerned as early as possible on, inter alia, the introduction of such changes, the effects they are likely to have and the measures for averting or mitigating the adverse effects of such changes.

(2) To enable the workers' representatives concerned to participate effectively in the consultations referred to in subparagraph (1) of this Paragraph, the employer should supply them in good time with all relevant information on the major changes contemplated and the effects they are likely to have.

(3) For the purposes of this Paragraph the term "the workers' representatives concerned" means the workers' representatives recognized as such by national law or practice, in conformity with the Workers' Representatives Convention, 1971.

Measures to avert or minimize termination

21. The measures which should be considered with a view to averting or minimizing terminations of employment for reasons of an economic, technological, structural or similar nature might include, inter alia, restriction of hiring, spreading the workforce reduction over a certain period of time to permit natural reduction of the workforce, internal transfers, training and retraining, voluntary early retirement with appropriate income protection, restriction of overtime and reduction of normal hours of work.

22. Where it is considered that a temporary reduction of normal hours of work would be likely to avert or minimize terminations of employment due to temporary economic difficulties, consideration should be given to partial compensation for loss of wages for the normal hours not worked, financed by methods appropriate under national law and practice.

Criteria for selection for termination

23. (1) The selection by the employer of workers whose employment is to be terminated for reasons of an economic, technological, structural or similar nature should be made according to criteria, established wherever possible in advance, which give due weight both to the interests of the undertaking, establishment or service and to the interests of the workers.

(2) These criteria, their order of priority and their relative weight, should be determined by the methods of implementation referred to in Paragraph 1 of this Recommendation.

Priority of rehiring

24. (1) Workers whose employment has been terminated for reasons of an economic, technological, structural or similar nature, should be given a certain priority of rehiring if the employer again hires workers with comparable qualifications, subject to their having, within a given period from the time of their leaving, expressed a desire to be rehired.

(2) Such priority of rehiring may be limited to a specified period of time.

(3) The criteria for the priority of rehiring, the question of retention of rights — particularly seniority rights — in the event of rehiring, as well as the terms governing the wages of rehired workers, should be determined according to the methods of implementation referred to in Paragraph 1 of this Recommendation.

Mitigating the effects of termination

25. (1) In the event of termination of employment for reasons of an economic, technological, structural or similar nature, the placement of the workers affected in suitable alternative employment as soon as possible, with training or retraining where appropriate, should be promoted by measures suitable to national circumstances, to be taken by the competent authority, where possible with the collaboration of the employer and the workers' representatives concerned.

(2) Where possible, the employer should assist the workers affected in the search for suitable alternative employment, for example through direct contacts with other employers.

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(3) In assisting the workers affected in obtaining suitable alternative employment or training or retraining, regard may be had to the Human Resources Development Convention and Recommendation, 1975.

26. (1) With a view to mitigating the adverse effects of termination of employment for reasons of an economic, technological, structural or similar nature, consideration should be given to providing income protection during any course of training or retraining and partial or total reimbursement of expenses connected with training or retraining and with finding and taking up employment which requires a change of residence.

(2) The competent authority should consider providing financial resources to support in full or in part the measures referred to in subparagraph (1) of this Paragraph, in accordance with national law and practice.

IV. Effect on earlier Recommendation

27. This Recommendation and the Termination of Employment Convention, 1982, supersede the Termination of Employment Recommendation, 1963.

APPENDIX II

Ratifications of the Termination of Employment Convention, 1982 (No. 158)

Date of entry into force: 23.11.1985

States	Ratification registered	States	Ratification registered
Australia	26.02.93	Niger	05.06.85
Bosnia and Herzegovina	02.06.93	Slovenia	29.05.92
Brazil	05.01.95	Spain	26.04.85
Cameroon	13.05.88	Sweden	20.06.83
Cyprus	05.07.85	Turkey	04.01.95
Ethiopia	28.01.91	Uganda	18.07.90
Finland	30.06.92	Ukraine	16.05.94
France	16.03.89	Venezuela	06.05.85
Gabon	06.12.88	Yemen	13.03.89
Latvia	25.07.94	Yugoslavia	23.11.84
Malawi	01.10.86	Zaire	03.04.87
Morocco	07.10.93	Zambia	09.02.90

Total number of ratifications: 24

APPENDIX III

Reports received under article 19 of the Constitution

Member States	Convention No. 158		Recommendation No. 166
	Date of ratification	Article 19	Article 19
Afghanistan	–	–	–
Albania	–	–	–
Algeria	–	–	–
Angola	–	–	–
Antigua and Barbuda	–	–	–
Argentina	–	X	X
Armenia	–	–	–
Australia	26.02.93	–	X
Austria	–	X	X
Azerbaijan	–	X	X
Bahamas	–	–	–
Bahrain	–	–	–
Bangladesh	–	X	X
Barbados	–	X	X
Belarus	–	X	X
Belgium	–	X	X
Belize	–	X	X
Benin	–	X	X
Bolivia	–	X	X
Bosnia and Herzegovina	02.06.93	–	–
Botswana	–	X	X
Brazil	05.01.95	X	X
Bulgaria	–	X	X
Burkina Faso	–	X	X
Burundi	–	–	–
Cambodia	–	X	X
Cameroon	13.05.88	–	–
Canada	–	X	X
Cape Verde	–	–	–
Central African Republic	–	X	X

Member States	Convention No. 158		Recommendation No. 166
	Date of ratification	Article 19	Article 19
Chad	–	–	–
Chile	–	X	X
China	–	X	X
Colombia	–	X	X
Comoros	–	X	X
Congo	–	–	–
Costa Rica	–	X	X
Côte d'Ivoire	–	X	X
Croatia	–	X	X
Cuba	–	X	X
Cyprus	05.07.85	–	X
Czech Republic	–	X	X
Denmark	–	X	X
Djibouti	–	–	–
Dominica	–	X	X
Dominican Republic	–	X	X
Ecuador	–	X	X
Egypt	–	X	X
El Salvador	–	–	–
Equatorial Guinea	–	X	X
Eritrea	–	X	X
Estonia	–	X	X
Ethiopia	28.01.91	–	X
Fiji	–	–	–
Finland	30.06.92	–	X
France	16.03.89	–	–
Gabon	06.12.88	–	X
Georgia	–	–	–
Germany	–	X	X
Ghana	–	X	X
Greece	–	X	X
Grenada	–	X	X
Guatemala	–	–	–
Guinea	–	X	X
Guinea-Bissau	–	–	–
Guyana	–	–	–
Haiti	–	–	–
Honduras	–	–	–
Hungary	–	X	X
Iceland	–	X	X
India	–	X	X

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Member States	Convention No. 158		Recommendation No. 166
	Date of ratification	Article 19	Article 19
Indonesia	–	X	X
Iran, Islamic Republic of	–	–	–
Iraq	–	X	X
Ireland	–	X	X
Israel	–	X	X
Italy	–	X	X
Jamaica	–	–	–
Japan	–	–	–
Jordan	–	X	X
Kazakhstan	–	–	–
Kenya	–	X	X
Korea, Republic of	–	X	X
Kuwait	–	X	X
Kyrgyzstan	–	–	–
Lao People's Democratic Republic	–	–	–
Latvia	25.07.94	X	X
Lebanon	–	X	X
Lesotho	–	–	–
Liberia	–	–	–
Libyan Arab Jamahiriya	–	–	–
Lithuania	–	–	–
Luxembourg	–	X	X
Madagascar	–	X	X
Malawi	01.10.86	–	–
Malaysia	–	X	X
Mali	–	X	X
Malta	–	X	X
Mauritania	–	–	–
Mauritius	–	X	X
Mexico	–	X	X
Moldova, Republic of	–	–	–
Mongolia	–	–	–
Morocco	07.10.93	–	X
Mozambique	–	–	–
Myanmar	–	X	X
Namibia	–	X	X
Nepal	–	–	–
Netherlands	–	–	–
New Zealand	–	X	X
Nicaragua	–	X	–

Member States	Convention No. 158		Recommendation No. 166
	Date of ratification	Article 19	Article 19
Niger	05.06.85	–	X
Nigeria	–	–	–
Norway	–	X	X
Pakistan	–	X	X
Panama	–	X	X
Papua New Guinea	–	–	–
Paraguay	–	–	–
Peru	–	X	X
Philippines	–	X	X
Poland	–	X	X
Portugal	–	X	X
Qatar	–	X	X
Romania	–	X	X
Russian Federation	–	X	X
Rwanda	–	–	–
Saint Lucia	–	–	–
San Marino	–	X	X
Sao Tome and Principe	–	X	X
Saudi Arabia	–	X	X
Senegal	–	X	X
Seychelles	–	X	X
Sierra Leone	–	–	–
Singapore	–	X	X
Slovakia	–	X	X
Slovenia	29.05.92	–	X
Solomon Islands	–	–	–
Somalia	–	–	–
Spain	26.04.85	–	X
Sri Lanka	–	X	X
Sudan	–	X	X
Suriname	–	X	X
Swaziland	–	X	X
Sweden	20.06.83	–	X
Switzerland	–	X	X
Syrian Arab Republic	–	X	X
Tanzania, United Republic of	–	X	X
Thailand	–	X	X
The former Yugoslav Republic of Macedonia	–	–	–
Togo	–	–	–
Trinidad and Tobago	–	–	–

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Member States	Convention No. 158		Recommendation No. 166
	Date of ratification	Article 19	Article 19
Tunisia	–	X	X
Turkey	04.01.95	X	X
Turkmenistan	–	–	–
Uganda	18.07.90	–	–
Ukraine	16.05.94	–	–
United Arab Emirates	–	X	X
United Kingdom	–	X	X
United States	–	X	X
Uruguay	–	X	X
Uzbekistan	–	–	–
Venezuela	06.05.85	–	–
Viet Nam	–	–	–
Yemen	13.03.89	–	–
Zaire	03.04.87	–	–
Zambia	09.02.90	–	X
Zimbabwe	–	X	X
Total of reports received		96	106

Note: In addition, a total of 22 reports have been received, under article 19 of the Constitution, in respect of the following non-metropolitan territories: United Kingdom (Anguilla, Bermuda, British Virgin Islands, Falkland Islands (Malvinas), Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Montserrat, St. Helena).